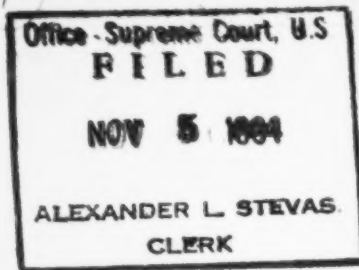


84-718



Number A-194

**IN THE
SUPREME COURT OF THE UNITED STATES**

October Term, 1984

Robert L. Mendenhall, Petitioner,

vs.

**The United States of America, The United States
Department of the Interior, and Cecil D. Andrus,
Secretary of the Interior and Edward F. Spang,
State Director of the Nevada Office of the
Bureau of Land Management, Respondent.**

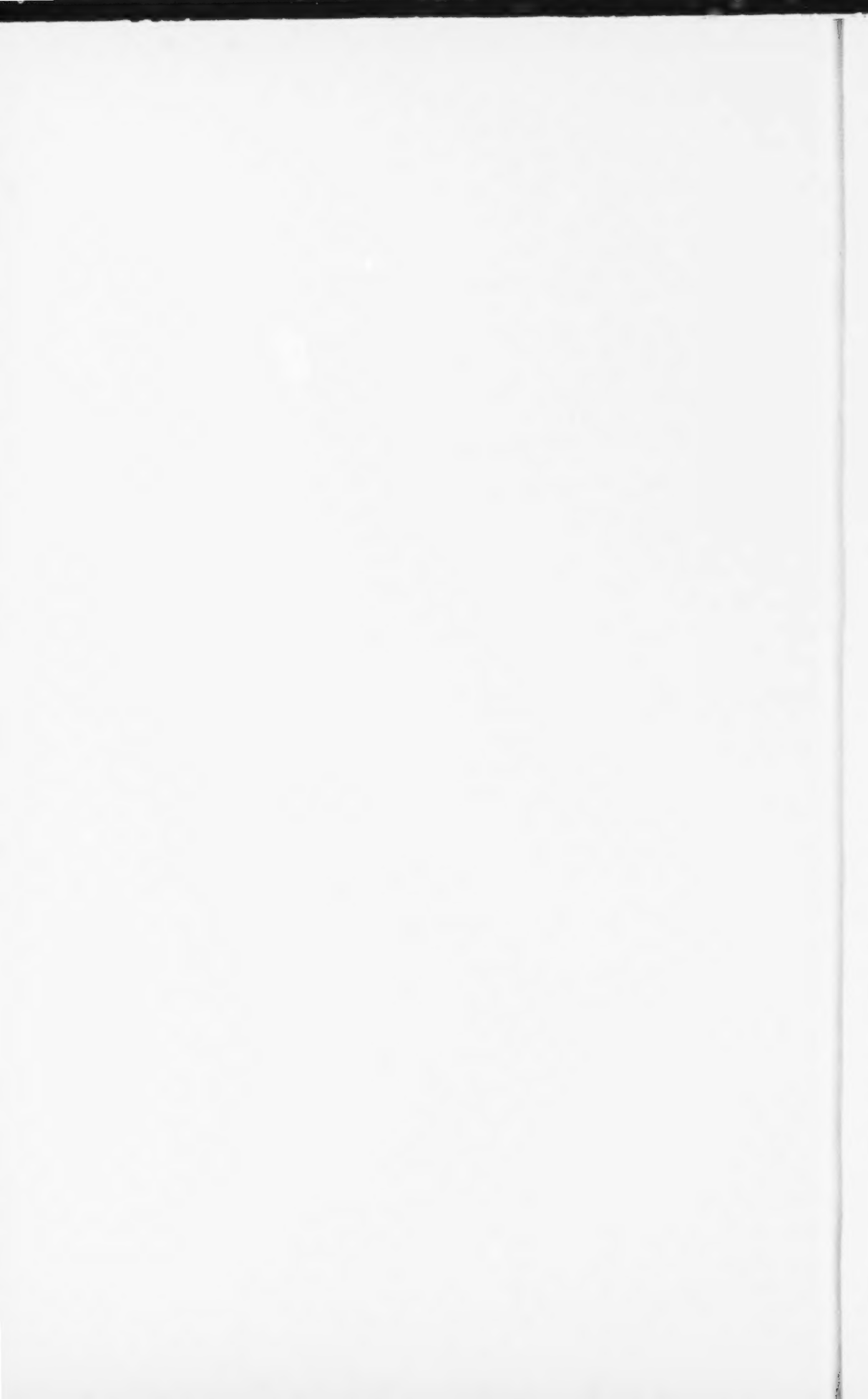
On Writ of Certiorari to the
United States Court of Appeals
for the Ninth Circuit

Petition for Writ of Certiorari

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Phoenix, Arizona 85013

Counsel for Petitioner

11/10/84



Questions Presented for Review

1. Has Respondent, in administering the mining law, applied a standard of "discovery" wholly outside judicial interpretation and in opposition to the intent of Congress and the purpose of the mining laws?

2. Does due process require that agency discretion be judicially reviewed as to the facts in a condemnation without compensation and with no higher purpose contemplated for the condemned property?



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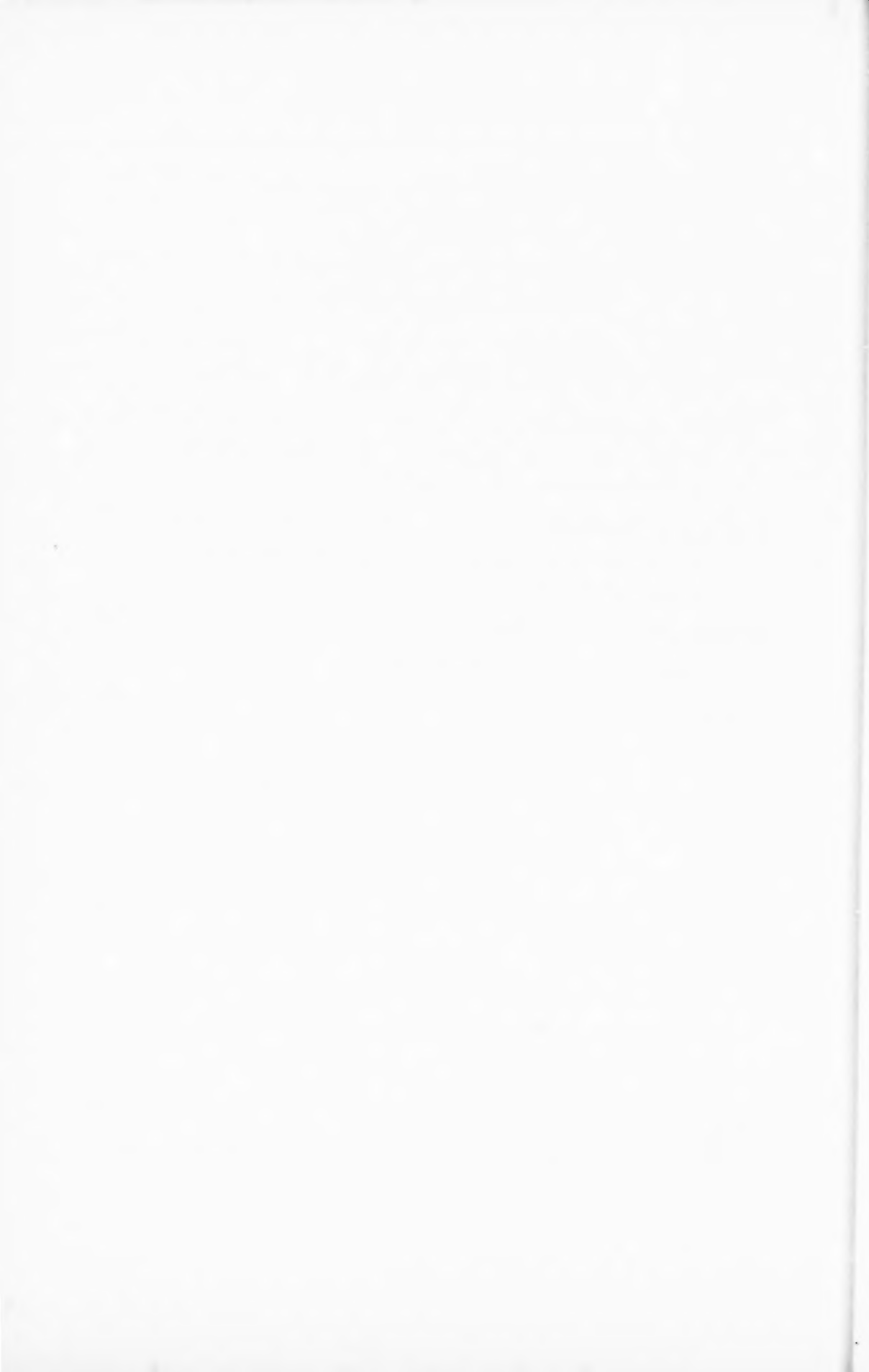
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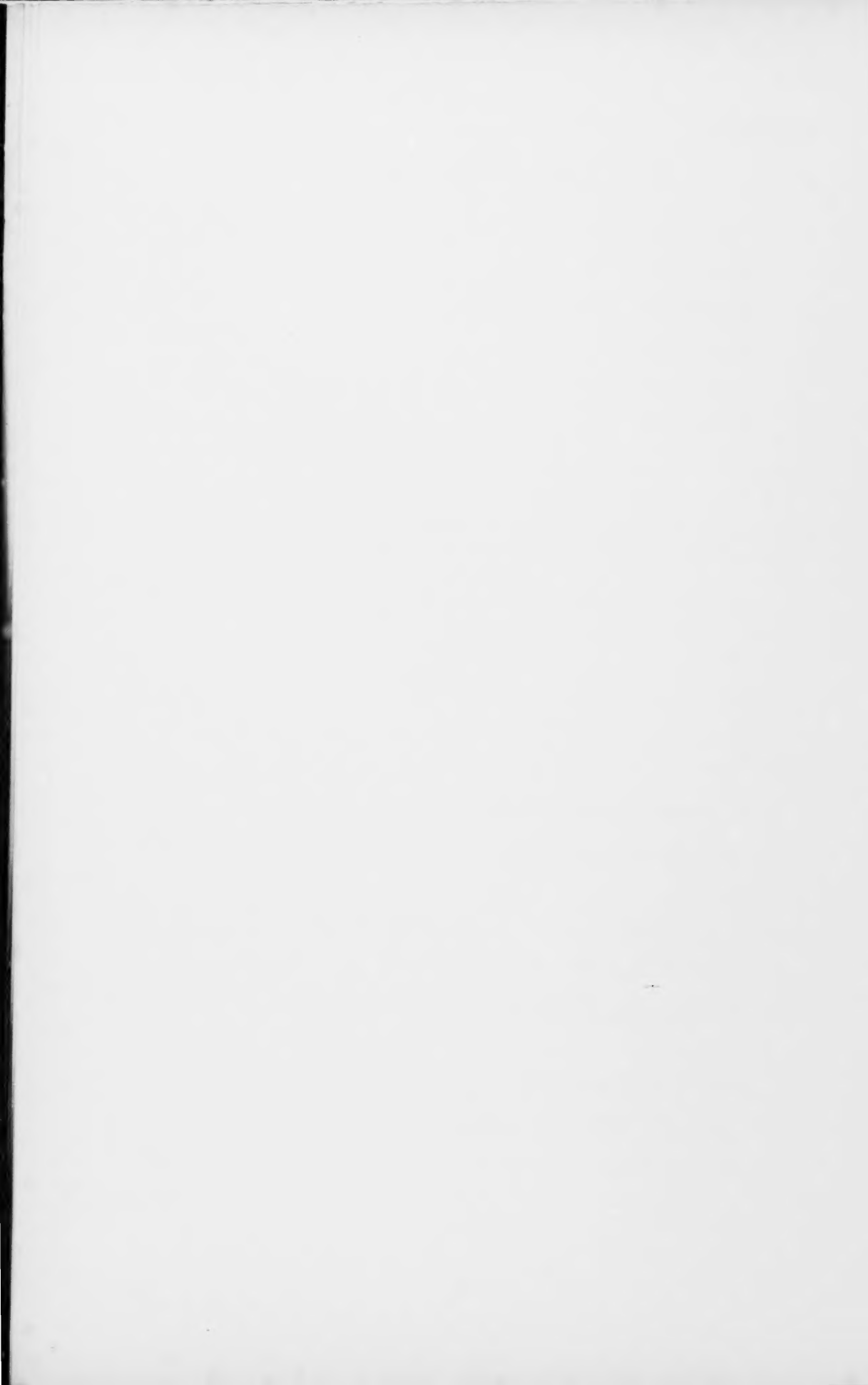
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CITATIONS FOR OPINIONS
DELIVERED IN THE COURTS AND
THE INTERIOR DEPARTMENT

U.S. v. Frank Sullivan, Nevada No.
065733

U.S. v. Sullivan, I.B.L.A. 72-273,
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Robert L. Mendenhall v. U.S.,
Dist. Ct. Nevada, CV-R-80-146-ECR (1982)

Mendenhall v. U.S., Ninth Cir.
Ct. of Appeals, No. 83-1751 (1984);
Rehearing denied June 28, 1984.



JURISDICTION

The United States District Court for the District of Nevada had jurisdiction over this matter by virtue of the Administrative Procedures Act, 5 U.S.C. Section 701, et seq. and 28 U.S.C. Section 1331, et seq., which authorize and restrict judicial review of a decision by an administrative law judge and the Interior Board of Land Appeals.

The judgment of the Court of Appeals for the Ninth Circuit, affirming the Federal District Court, was entered on May 1, 1984. Petition for rehearing was denied by order dated June 28, 1984.

Orders Extending Time to File Petition for Writ of Certiorari were granted by Associate Justice of the Supreme Court of the United States, William H. Rehnquist. This petition for Certiorari is timely filed on or before the extension dates granted in said orders, first to October 26, 1984, then to November 5, 1984.



This courts' jurisdiction is
invoked under 28 U.S.C. Section 1254
(1), and the Fifth Amendment of the U.S.
Constitution.



CONSTITUTIONAL PROVISION

and

STATUTES INVOLVED

1. **Constitutional Amendment V**

No person . . . shall be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

2. 30 U.S.C. §21, 22, 26, & 35 -CHAPTER 2

Mineral Lands and Regulations in

General. §22 is set forth below:

**§ 22. Lands open to purchase by
citizens**

Except as otherwise provided, all valuable mineral deposits in lands belonging to the United States, both surveyed and unsurveyed, shall be free and open to exploration and purchase, and the lands in which they are found to occupation and purchase, by citizens of the United States and those who have declared their intention to become such, under regulations prescribed by law, and according to the local customs or rules of miners in the several mining districts, so far as the same are applicable and not inconsistent with the laws of the United States.

R.S. Section 2319; Feb. 25, 1920, c. 85 Section 1, 41 Stat. 437.



3. 30 U.S.C.A. Section 161 (known as the Building Stone Act)

§161. Entry of building stone

lands; previous law unaffected

Any person authorized to enter lands under the mining laws of the United States may enter lands that are chiefly valuable for building stone under the provisions of the law in relation to placer mineral claims. Lands reserved for the benefit of the public schools or donated to any States shall not be subject to entry under this section. Nothing contained in this section shall be construed to repeal section 471 of Title 16 relating to the establishment of national forests.

Aug. 4, 1892, c. 375, §§ 1, 3, 27
Stat. 348

4. 30 U.S.C.A. Section 611 (known as the Common Varieties Act).

§611. - Common varieties of sand, stone, gravel, pumice, pumicite, or cinders and petrified wood.

No deposit of common varieties of sand, stone, gravel, pumice, pumicite, or cinders and no deposit of petrified wood shall be deemed a valuable mineral deposit within the meaning of the mining laws of the

United States so as to give effective validity to any mining claim hereafter located under such mining laws: Provided, however, That nothing herein shall affect the validity of any mining location based upon discovery of some other mineral occurring in or in association with such a deposit.

"Common varieties" as used in sections 601, 603, and 611 to 615 of this title does not include deposits of such materials which are valuable because the deposit has some property giving it distinct and special value and does not include so-called "block pumice" which occurs in nature in pieces having one dimension of two inches or more. "Petrified wood" as used in sections 601, 603, and 611 to 615 of this title means agatized, opalized, petrified, or silicified wood, or any material formed by the replacement of wood by silica or other matter.

July 23, 1955, c. 375, Section 3, 69 Stat. 368; Sept. 18, 1962, Pub. L. 87-713, Section 1, 76 Stat. 652.



STATEMENT OF THE CASE

Petitioner purchased the unpatented mining claims hereinafter referred to as the Charleston 24/39 located approximately 12 road miles northwest of the city of Las Vegas. The claims, more particularly described in the records of the Bureau of Land Management, were located by E.H. Brawner, et. al. on February 28, 1955, and were part of a group known collectively as the "Charleston Claims". Frank R. Sullivan acquired the "Charleston Claims" on April 9, 1959. Sullivan mined in the area and subsequently quitclaimed a large group of Charleston claims, not including the Charleston 24/39, to Charlestone Stone Products Co.

In 1965, Donald G. Fisher, a mining engineer employed by Respondent to examine mining claims in the Las Vegas area and to invalidate those in

violation of Title 30 U.S.C., §611, reported that the Charleston claims were invalid for want of a "discovery". Consequently, Respondent brought contests against Charlestone Stone Products Co. and Petitioners' predecessor, Frank R. Sullivan. Fisher testified in the Bureau of Land Management (BLM) hearing against Charlestone Stone Products Co. but was transferred to another area department of the BLM before the hearing in U.S. v. Frank Sullivan¹. He was replaced by Thomas E. Schessler as Lands and Minerals staff Officer with the Las Vegas District of the BLM, to become sole witness against the Sullivan claims. In both U.S. v. Charlestone and U.S. vs. Sullivan, the hearing examiner

1. U.S. v. Frank Sullivan, Nevada No. 065733



ruled the Charleston claims null and void and the Interior Board of Land Appeals affirmed.

Upon judicial review in Charlestone Stone Products Co. v. Morton² the District Court ruled that at least sixteen of the Charlestone claims were valid. On May 12, 1979, in Charlestone Stone Products v. U.S.,³ the higher court concurred, reversing Respondent's invalidation of the mineral discovery. Andrus v. Charlestone Stone Products Co.⁴ followed; but the Supreme Court decided only that water on the Charlestone claims was not locatable

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2. Charlestone Stone Products Co. v. Morton, Civil No. LV-2039 BRT (D. Nev., November 7, 1974)
 3. Charlestone Stone Products v. U.S., No. 75-1532, Ninth Cir. Ct. of Appeals, decided May 12, 1977; order clarifying remand dated Jan. 3, 1979 (see appendix).
 4. Andrus v. Charlestone Stone Products Co., 436 US 604 (1978)

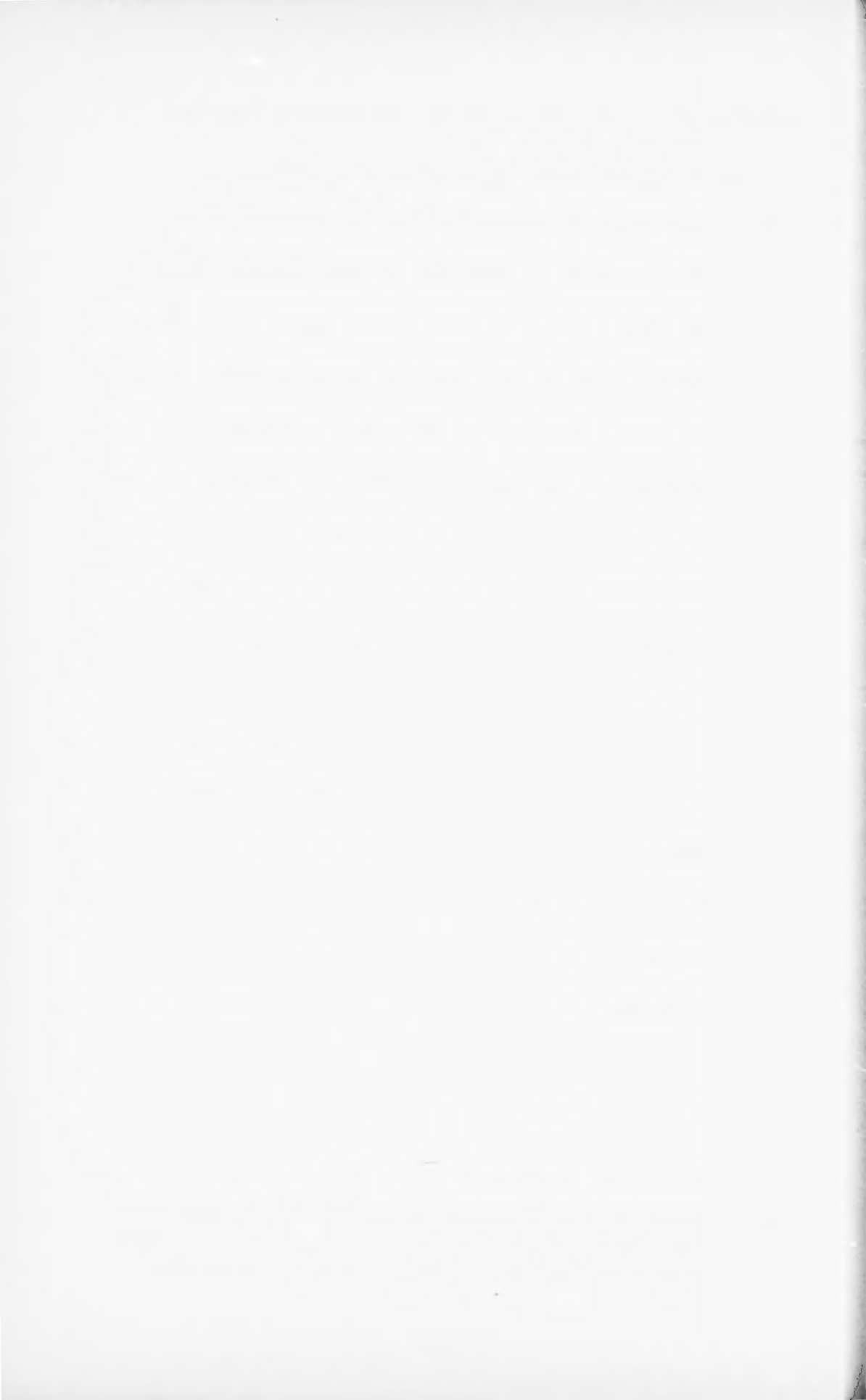


under Title 30 §22. In a June 28, 1978 letter, the U.S. Department of the Interior, Office of the Solicitor, wrote that the Supreme Court did not alter the Ninth Circuit's holding with regard to the mineral discovery on the Charlestone claims and that the matter should be remanded to the Department of the Interior for further proceedings; and the Ninth Circuit clarified its remand on January 3, 1979. Patent for the Charleston Nos. 1-22 mining claims was subsequently applied for and granted.

Meanwhile, Petitioner, Robert L. Mendenhall, had purchased from Sullivan the Charleston 24/39 (see Mendenhall's District Court Affidavit in appendix). Mendenhall proceeded to mine the aggregate from the Charleston 24/39 on a large and profitable scale and evidence presented in Robert L. Mendenhall v. U.S.,⁵ that special qualities of the

aggregate, which even Respondents expert witness Schessler recognized, had overcome any disadvantages of distance from the market. The District Court flew in the face of the fact that Petitioner had developed a successful mine on the Charleton 24/39, proving Sullivan's "discovery"; and the court ignored the findings of the Ninth Circuit Court of Appeals in Charlestone Stone Products, Inc. v. U. S., supra. The District Court ruled that Schessler's feeble contention that the claims were too far from the market ever to become anything, was substantial evidence of no "discovery". On Appeal the Ninth Circuit concurred, May 1, 1984. From that decision this appeal is made.

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5. Robert L. Mendenhall v. U.S., Dist. Ct. Nevada, CV-R-80-146-ECR, confirmed (see affidavit of geologist and mining engineer, George Kiersch in appendix)



The land in question remains open to mineral entry, so Petitioner has exercised his right to stake new mining claims on the discovery, but relying on findings against Charleston 24/39, the Respondent has instigated trespass proceedings against Petitioner.

FIRST REASON FOR ALLOWANCE OF THE WRIT

1. Respondent, in administering the mining laws, has been applying a standard of "discovery" wholly outside judicial interpretation and in opposition to the intent of Congress and the purpose of the mining laws.

Before the first federal mining laws were codified in 1866, the importance of a "discovery" on the claims was a matter of establishing primacy of possessory right. Two prospectors exploring in the same area were often racing to be the first with a mineral discovery around which one would be entitled to stake his claim and record it with the local mining district. The federal statutory authority for these mining claims proceeded after the mining laws were born of necessity in frontier mining communities. In 1866, the federal

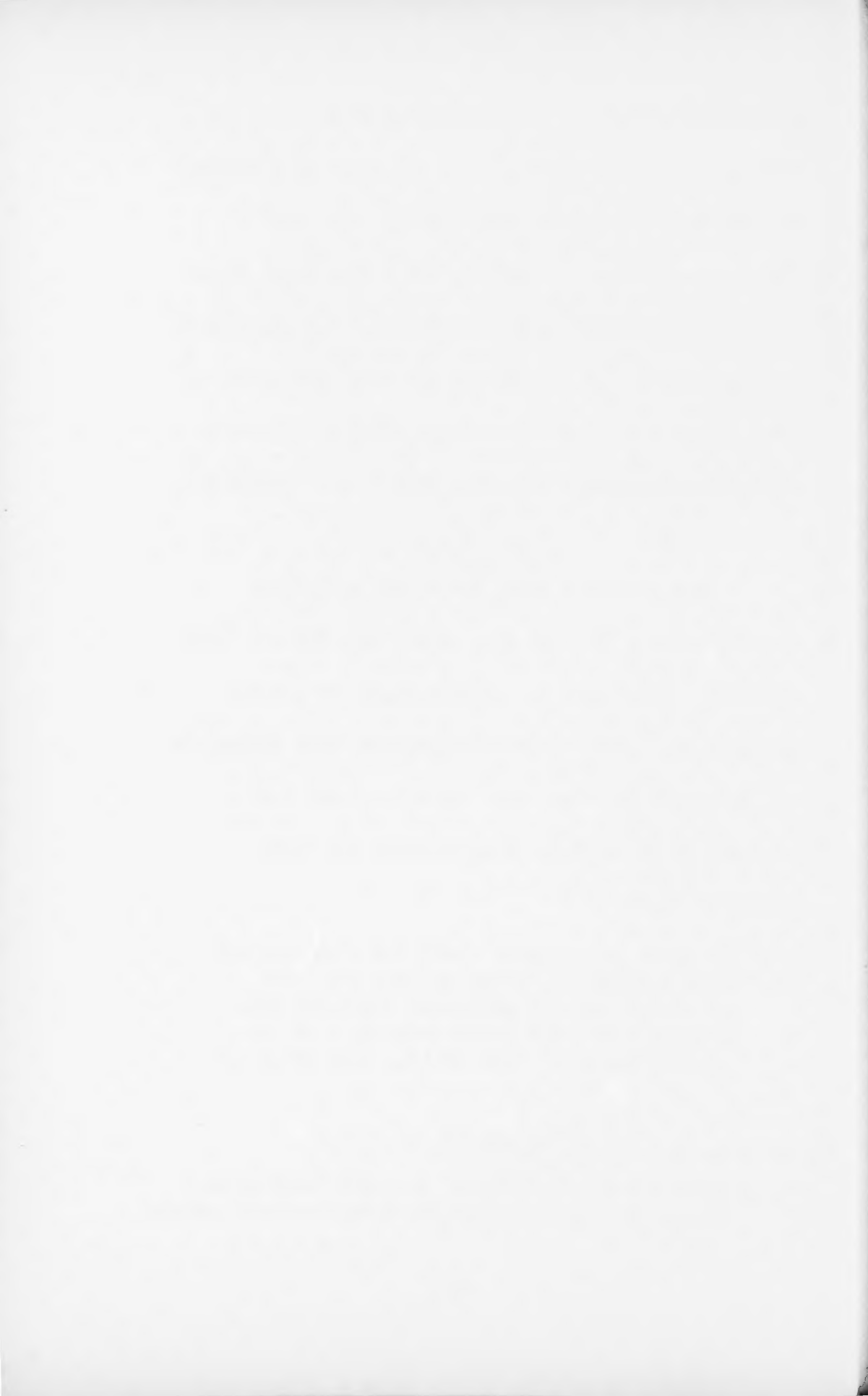


government gave statutory authority to the principle that "all valuable mineral deposits in lands belonging to the United States... shall be free and open to exploration and purchase."⁶ Congress recognized the success of the miners' own laws in facilitating the discovery and development of the nation's mineral resources.

The policy and general purpose declared by Title 30, Section 22 of the mining laws was to encourage as many people as possible to assume the hazards of searching for and extracting the valuable minerals deposited in the public lands.

It was supposed that by reason of the stimulus thus given to the production of mineral wealth and rendering the same available to commerce and the arts, the public

6. Mineral Lands and Mining 30 U.S.C Section 22.
Quoted in entirety under "Statutes Involved" herein.



would indirectly receive a compensation commensurate with the value of the grant. Thus considered, the legislation was approved as embodying a wise public policy.⁷

The Courts have consistently interpreted the intent of Congress to have been to reward and encourage the discovery of valuable minerals;⁸ and U.S. ex rel. U.S. Borax Co. v. Ickes⁹ removed any doubt as to the purpose being restricted by lode or placer qualifications of the mineral deposit. The first federal statutes recognized only a lode type of mining claim.

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7. U.S. v. Rizzinelli, D.C. Idaho 1910, 182 F.675. See also McKinley v. Wheeler, Colo. 1888, 9 S.Ct. 638, 130 U.S. 630.
 8. Bowen v. Sil Flo, 1969, 451 P.2d 626, 9 Ariz.App. 268; Haydenfeldt v. Daney, Nev. 1877, 93 U.S. 634; Creede & Cripple Creek v. Uinta Tunnel, Colo. 1905, 25 S. Ct. 266, 196 U.S. 337; Steel v. Smelting Co., Colo. 1882, 1 S.Ct. 389, 106 U.S. 477.
 9. U.S. ex rel. U.S. Borax Co. v. Ickes, 1938, 98 F.2d 271, 68 App. D.C. 399, cert den 59 S. Ct. 80, 305 U.S. 619.



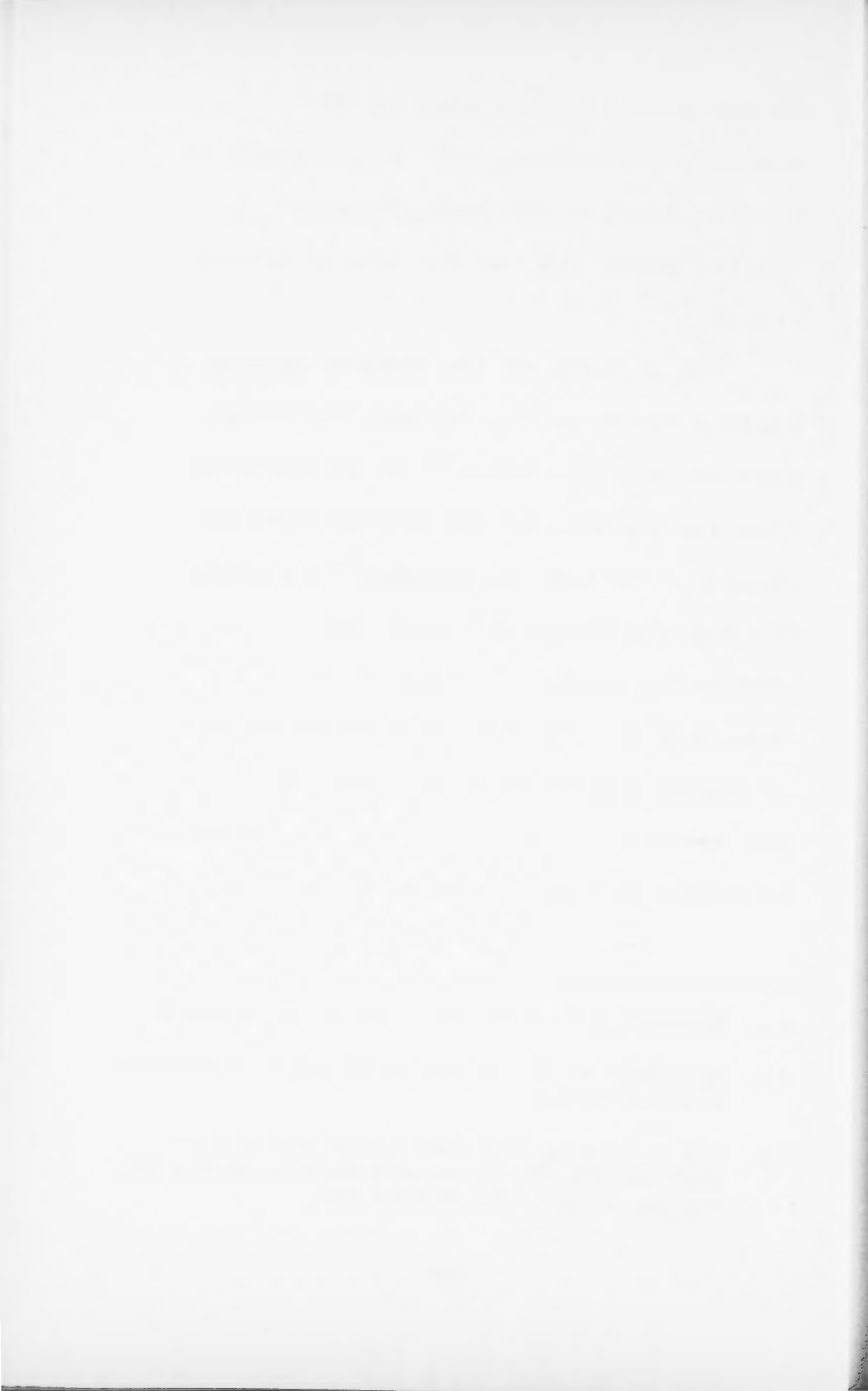
Placer claims became part of the statutes thereafter, and Petitioner's mineral deposit has been properly located under the law for placer mining claims.¹⁰

The purpose of the federal mining statute known as the "Common Varieties Act" of July 23, 1955,¹¹ is no different than the purpose of the mining laws in general. In U.S. v. Coleman¹² in 1968, the Supreme Court affirmed the continuing intent of Congress to encourage mining even in consideration of common varieties of mineral. Within the context of this purpose, the Common Varieties Act was to solve a particular

10. Mineral Lands and Mining, Title 30, U.S.C., Sec. 35.

11. Ibid., Title 30, U.S.C., Section 611, quoted in "Statutes Involved" herein.

12. U.S. v. Coleman, Cal. 1968, 390 US 599, 88 S Ct 1327, reh den. 391 US 961, 88 S Ct 1834, 391 U.S. 961, cert den 89 S.Ct. 1014, 394 U.S. 907.



problem. According to testimony by Clifford Young, member of Congress and of the House Interior and Insular Affairs Committee at the time the Act was drafted:

" . . . People were using the right to locate mining claims for purposes not connected with bonafide mining purposes, . . . People would locate claims for a cabin for recreational purposes or to tie up a good trout stream. Other land was located for commercial purposes to establish a site for a service station or curio shop. .

The bill was strongly supported by the mining industry . . . they wanted to preserve as large an area as possible of the type of materials that would be subject to location in the traditional way . . . " ¹³

The remedial legislation removed as of July 23, 1955, "common varieties" of mineral, specifically "sand, stone, gravel, pumice, pumicite or cinders and petrified wood" from location under the

13. U.S. v. Guzman, Arizona Contest Nos. A-035688 and A-035690 (1973).



mining laws. Even so, the Act exempted "common varieties" having "distinct and special value," leaving undisturbed the idea that a discovery of valuable mineral on the public lands should be open to exploration and development by bona fide prospectors.

In the administration of the Common Varieties Act, however, the new effort to define a "discovery" created complexities wholly out of keeping with the simple issue of good faith which the act of July 23, 1955 and the mining laws in general had intended.

In 1893,¹⁴ the Courts first interpreted the meaning of "valuable mineral deposit" (30 U.S.C. Section 22). One year later in Castle v.

14. Book v. Justice Mining Co., 58 F. 106, 124-25 (C.C.D. Nev. 1893).



Womble,¹⁵ the land department enunciated what would become known as the "prudent man rule:"

"Where minerals have been found and the evidence is of such a character that a person of ordinary prudence would be justified in the further expenditure of his labor and means, with a reasonable prospect of success, in developing a valuable mine . . . to hold otherwise would tend to make of little avail, if not entirely nugatory, that provision of the law whereby "all valuable mineral deposits in lands belonging to the United States . . . are . . . declared to be free and open to exploration and purchase. For, if as soon as minerals are shown to exist, and at any time during exploration, before the returns become renumeration, the lands are to be subject to other disposition, few would be found willing to risk time and capital in an attempt to bring to light and make available the mineral wealth, which lies concealed in the bowels of the earth, as Congress obviously must have intended the explorers should have proper opportunity to do."

15. Castle v. Womble, 19 Pub. Lands Dec. 455 (1894) approved by the Supreme Court in Chrisman v. Miller, 197 U.S. 313 (1905).



Petitioner's predecessor was the only witness in his own behalf at the hearing in U.S. v. Sullivan, Nevada No. 065733. The testimony leaves little doubt that Sullivan was developing in good faith what he called his "best gravel" on the Charleston 24/39. He and his predecessors before him and before passage of the Common Varieties Act in 1955 had, in fact, made sales from the Charleston claims. Sullivan's testimony as to sales and development was virtually un rebutted. Thomas E. Schessler, sole witness for Respondent, without benefit of supporting fact, simply delivered the opinion that the deposit was too far from the market to justify "the expenditures of labor and means, with a reasonable prospect of success in developing a valuable mine." Schessler had no knowledge of the advantages which the special value of



the deposit had in the marketplace, nor did he present any evidence that his opinion was based on any but one of the multitude of factors which effect the market for a mineral. Furthermore, according to Chrisman v. Miller, supra;

"Standards to be applied in determining what a prudent prospector would or would not do are not those of a trained engineer or geologist"

Verrue v. U.S.¹⁶ should have constrained the Respondent from pursuing an invalidation of Petitioner's mining claims. In Verrue absence of actual sales before the critical date of July 23, 1955, was not allowed to control in determining marketability, although the lack of sales was admittedly persuasive, depending upon the facts of the particular case.¹⁷ Sullivan's testimony

16. Verrue v. U.S., 457 F.2d 1202 (1972).



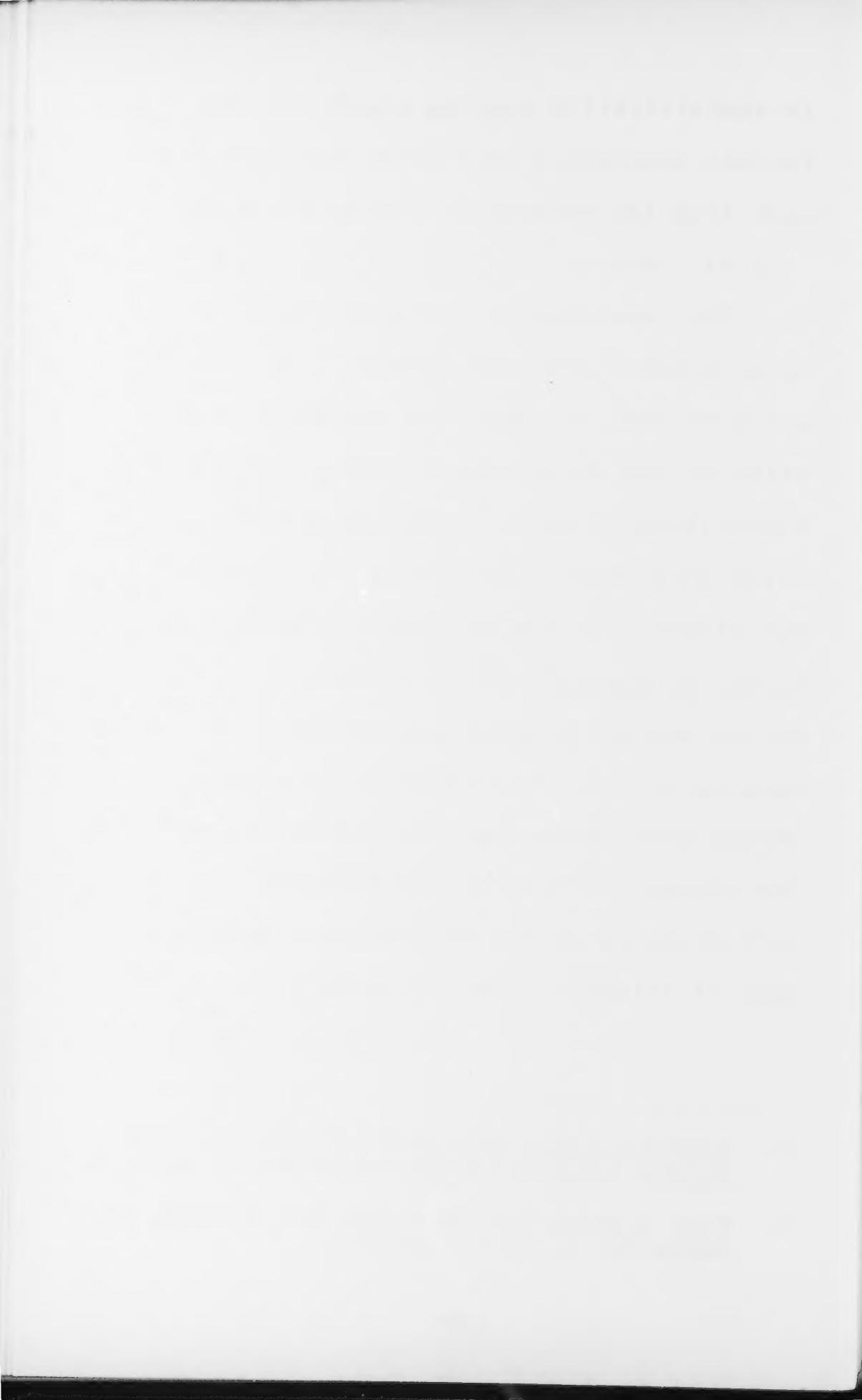
in administrative hearing supported the factual conclusion that sales had been made from the Charleston claims prior to July 23, 1955.

The idea that Mr. Schessler's opinion could overcome substantial evidence that Mr. Sullivan had made sales to the market arose from administrative habit involving claims which were made in bad faith for "common varieties". In the Las Vegas area Foster v. Seaton¹⁸ is an example.

Foster did not present any evidence of developing a mineral deposit, he simply showed that there was sand and gravel on the claims and that he could foresee circumstances in the future which might make it valuable. Out of cases like

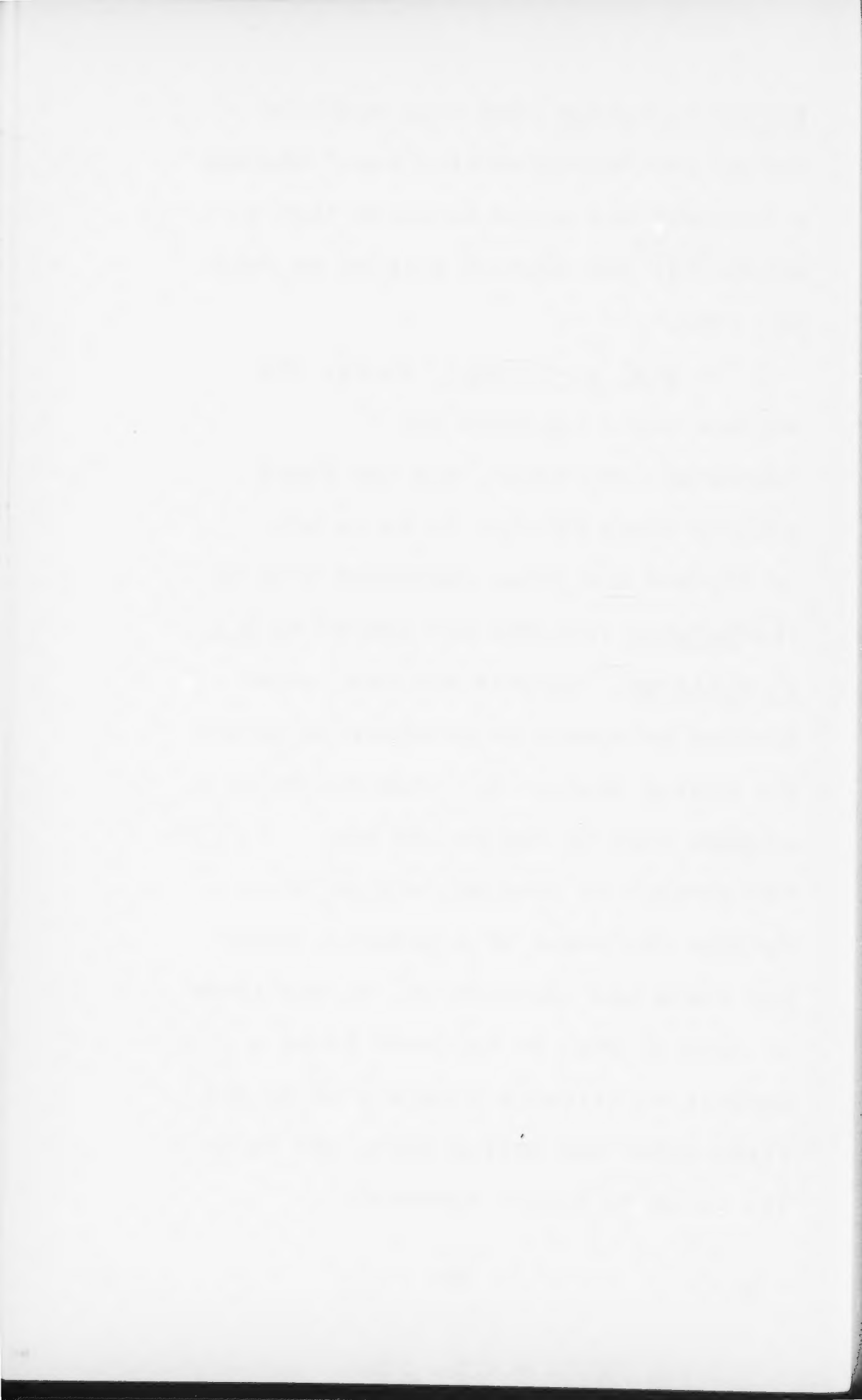
17. Edwards v. Kleppe, 588 F. 2d 671, 673 (9th Cir. 1978);
Melluzzo v. Morton, 534 F.2d 860-863 (9th Cir. 1976).

18. Foster v. Seaton, Dist. Ct. of App., D.C., No.14953, decided Oct. 22, 1959 (see appendix).



Foster v. Seaton came what would be called the "marketability test" whereby a claimant was asked to prove that a market for the deposit existed on July 23, 1955.

In U.S. v. Coleman, supra, the Supreme Court approved the "marketability test", but the Court clearly found Coleman to be in bad faith, and one other important fact of the Coleman case was not shared by U.S. v. Sullivan. Coleman was challenged because he sought to purchase or patent his mining claim. Sullivan did not propose that he had proven his "discovery" so conclusively as to warrant the issue of a patent. After his claim was invalidated, he continued to develop what he believed to be a deposit of valuable mineral, as is his right under the mining laws; and he sold the claim to Robert Mendenball,



Petitioner, who shared Sullivan's evaluation of the deposit and proceeded to develop a paying mine.

Evidence presented to the Federal District Court (affidavits in appendix of Petitioner and George Kiersch, geologist and engineer) proved that the Respondent erred in its invalidation of Petitioner's claims. Furthermore, the Appellate Court decision in Charlestone Stone Products v. Secretary of the Interior Cecil D. Andrus, supra, disallowed probative value to the type of mineral examination which Respondent's witness conducted.

The Charlestone decision should have effectively put an end to the habit of Respondent making a prima facie case out of the opinions of men like Schessler, who are inexperienced in the marketplace and who come into an area as much as ten years after the period of



time about which they are asked to testify.¹⁹ Like Charlestone Stone products, Petitioner is a good-faith entryman on the public lands. In addition the mineral deposit which the Court validated in the Charlestone case is the very same mineral for which Petitioner's claims were located.

There can be little doubt that U.S. v. Sullivan does not serve the purpose of the mining laws. Does it contribute to some alternative to free mining which Respondent may be proposing for developing the nation's mineral resources? Maybe Respondent seeks to administer the deposit by selling it to the highest bidder or otherwise lease

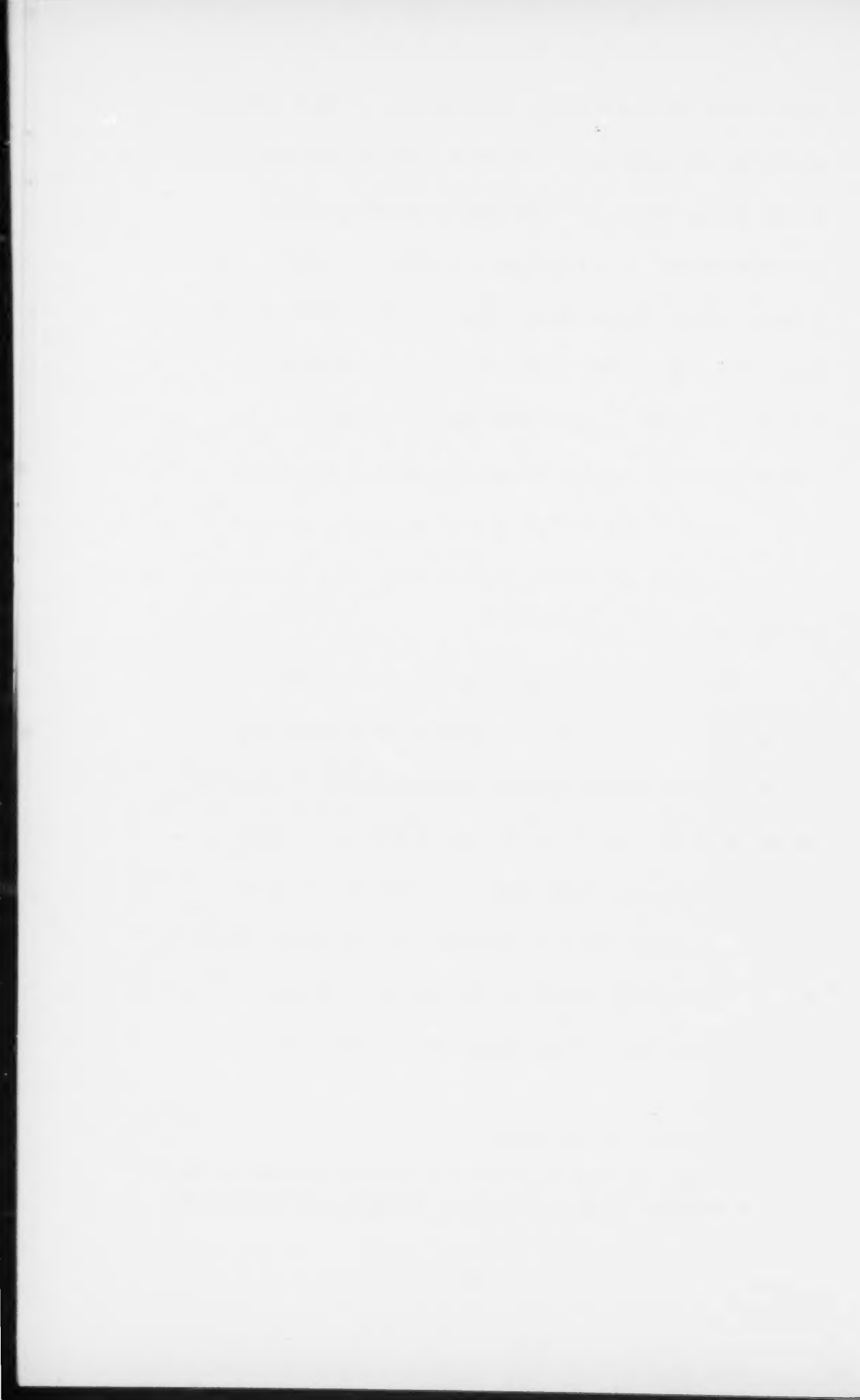
19. U.S. v. Boyle 519 F.2d 551 (9th Cir. 1975); U.S. v. Johnson, I.B.L.A. 78-507 (Feb.28,1979); U.S. v. Snyder U.S. Dist. Ct., Dist of Colo., Civil Action No. 66-C-131, decided Apr.8,1967; (10th Cir. Ct. decided May 24,1969).



the land for mining purposes. The Court should be advised of the costs which such programs by the Respondent have encountered historically and today. In 1845, when President Polk considered the cost of leasing the nation's lead mines, he sold them. The amount collected in lead mine rentals was exceeded by more than four times for a four year period²⁰ by the cost of administering the leasing program.

The nation's gas and oil resources, originally locatable under the mining laws, have been under government leasing programs since the early 1920's. The United States now imports most of its oil although it is common knowledge that huge deposits remain to be developed domestically. The Appellate Court in

20. Hansen, Clinton J., "Why a Location System for Hard Minerals," (Rocky Mountain Mineral Law Institute).



Arkla Exploration Co. and the State of Arkansas v. Arkansas-Texas Oil and Gas Corporation and James G. Watt²¹ appears to be attempting to hold Respondent responsible for the failures of its leasing program and a new Government Accounting Office Report²² concludes that although reasonable in concept, Respondent's emergency coal leasing regulations have been "difficult to administer within a competitive framework."

Administration of the Common Varieties Act in such a way as to increase the number of mineral deposits unavailable to those who would privately explore and develop the nation's mineral

21. Arkla Exploration Co. and the State of Arkansas v. Arkansas-Texas Oil and Gas Corporation and James G. Watt, 734 F.2d 347 (1984).

22. Government Accounting Office Report, GAO/RCED-84-17, August 2, 1984.



resources, is foolhardy and against the intent of Congress and the interpretation of the Common Varieties Act by the Courts. Under the law, deposits of valuable mineral on the public lands are free and open to bona fide mineral entryman like Petitioner. Respondent, however, has succeeded in convincing the Courts below that its "marketability test", when applied to mineral entryman who have provided substantial evidence that they are in good faith exploring and developing mineral on the public lands, is within the letter of the law. Clearly, the purpose of the mining laws is not served in approval by the Courts of U.S. v. Sullivan. Petitioner urges the Supreme Court to consider the familiar rule "that a thing may be within the letter of the statute and yet not within the statute, because not within its spirit,

nor within the intention of its
makers."²²

22. Holy Trinity Church v. U.S., 143 U.S. 457, 459 (1892).



SECOND REASON FOR ALLOWANCE OF WRIT

2. Due process requires that agency discretion be judicially reviewed as to the facts in a condemnation without compensation and with no higher purpose contemplated for the condemned property.

The mining laws have not changed in their purpose since they were enacted, but the laws are seldom fortified by court interpretation because increasingly the courts have elected to refuse to review or rehear the facts. The Courts below, in sympathy with sovereign immunity, were willing to leave agency discretion unchallenged in U.S. v. Sullivan despite factual evidence that Petitioner's property was being unlawfully seized. Best v. Humboldt Placer Mining Co.²⁴ has

24. Best v. Humboldt Placer Mining Co., 371 U.S. 334, 335 (1963).

frequently been relied upon for court approval of land agency immunity.

According to Best v. Humboldt:

If a patent has not issued, controversies over mining claims should be solved by appeal to the Land Department and not to the courts.

In Best v. Humboldt, the invalidated mining claims were to become part of the Trinity River Dam and Reservoir in California. The invalidation proceedings on the Humboldt claims were for purposes of determining whether a property right existed for which compensation was due. Petitioner has not been advised of the modicum of proof which Respondent required of Humboldt Placer Mining Co., but where Best v. Humboldt has shielded the Department of the Interior from making compensation for the taking of mining claims which have been developed in good faith, Petitioner wishes to supply a



measure of historical perspective for the Court. When the railroad and highway builders moving across the country attempted to devalue the mining claimant's work and worth, they were stopped in the courts by the mining law because the courts and due process were still available to the mining claimant²⁵. Years of administrative procedure and expense did not intervene, and the uncertainty of the value of mining land did not deprive it of the possessory title to monetary worth and protection.²⁶

In determining which procedural safeguards must be afforded Petitioner, the Court must consider the extent to

25. Zeigler v. South & North Ala. R.R. Co., 58 Ala. 594, 599 (1877).

26. Montana Ry. Co. v. Warren, 137 U.S. 348, 352-53 (1890). See also J. Adams & Barringer, The Law of Mines and Mining in the United States, 188 (1877).

which Mendenhall might suffer grievous loss, the nature of the government function involved, and the nature of the private interest affected - the criteria formulated in Morrissey v. Brewer.²⁷

In Best v. Humboldt, *supra*, and in Wilbur v. United States ex rel.

Krushnic, the Supreme Court has held that unpatented mining claims are possessory mineral interest in land, as well as "property in the fullest sense of that term."²⁸ Similarly, the Ninth Circuit Court of Appeals recently concluded that the holder of an unpatented mining claim has a property right:

(b)ecause an unpatented mining claim is a unique form of property which created in the owners a possessory

27. Morrissey v. Brewer, 408 U.S. 471, 481-82 (1972).

28. Wilbur v. United States ex rel. Krushnic, 280 U.S. 306, 317 (1930).



interest in the land, the loss of such an interest would constitute a substantial injury."²⁹

The extent of the loss to Petitioner is "property" by Supreme Court interpretation and thereby it is entitled under the Fifth Amendment of the U.S. Constitution to due process before Respondent can take it.

Morrissey v. Brewer, supra, instructs the courts to examine the nature of the governmental function involved in the taking of the property. In Best v. Humboldt, supra, the function of the government was to examine title prior to condemnation for a dam and reservoir. In U.S. v. Sullivan the government function is not

29. Western Mining Council v. Watt, 643 F.2d 618, 628 (1981). See also: Madison D. Locke v. Watt, U.S. Dist. Ct., Nevada, Civil R-82-297 BRT, decided October 21, 1983, cert. S.Ct., October, 1984.

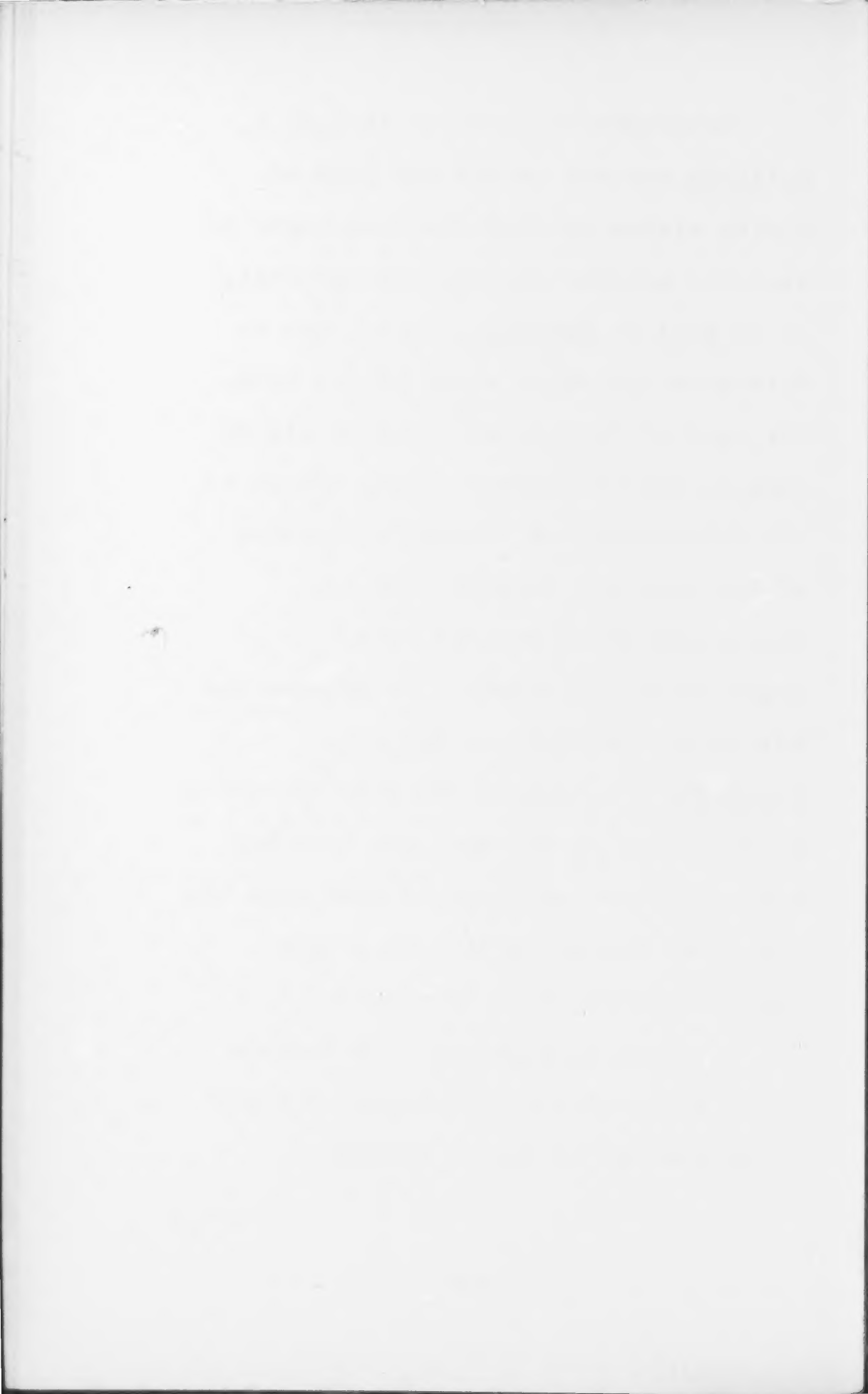
clear. The area of the Charleston claims was once part of a "small tract" classification by the Bureau of Land Management which could have resulted in the land's becoming valuable as real estate; but the area was removed from that classification because it is extremely susceptible to flash flooding and remains chiefly valuable for its mineral deposit.

The idea that development of certain deposits of mineral would be allowed only on public lands for which that mineral was the chief value came into the mining law by the Building Stone Act of 1892 (30 U.S.C. Section 161). The Common Varieties Act made no such limitation, the Common Varieties Act was to remove no valuable deposit of mineral located as of July 23, 1955, from the functioning of the general mining law.



Respondent's function in U.S. v. Sullivan was not to rid the land of mining claims so that the land might be used for another purpose without cost, as in Best v. Humboldt, supra, nor to determine the chief value of the land. The land of Petitioner's mining claims remains open to mineral entry today; so the Petitioner has located new mining claims over his discovery on the Charleston 24/39 and has made application for patent. He follows the advise of the Court in Best v. Humboldt: "A locator who does not carry his claim to patent does not lose his mineral claim, although he does take the risk that his claim will no longer support the issuance of a patent."

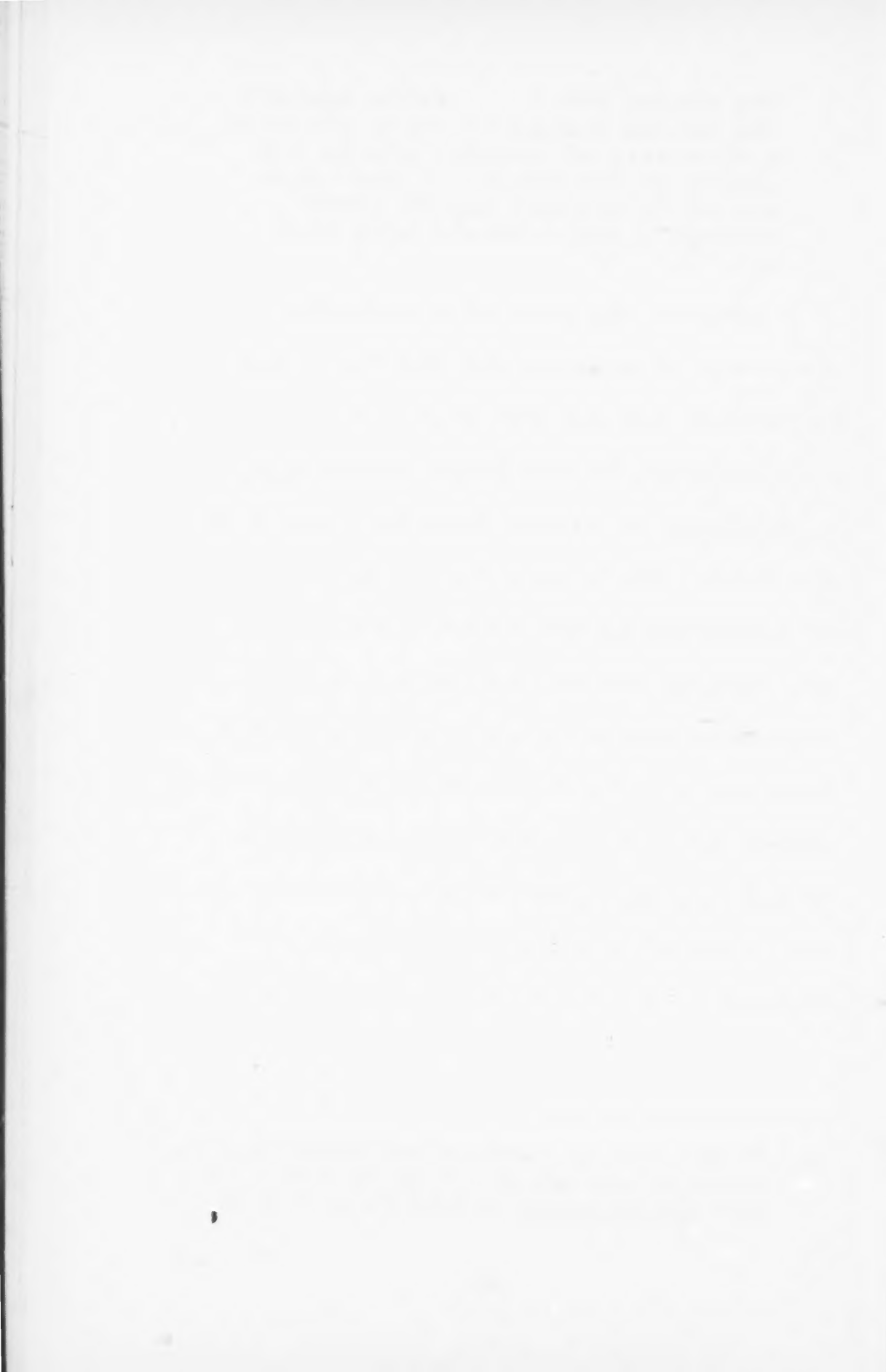
In Best v. Humboldt, the Supreme Court elaborated on the property right of an unpatented mining claimant:



The claims are . . . valid against the United States if there has been a discovery of mineral within the limits of the claim, if the lands are still mineral and if other statutory requirements have been met.³⁰

Despite the fact of a valuable discovery of mineral and the fact that Petitioner has met all statutory requirements, if the Court allows U.S. v. Sullivan to escape judicial review of the facts, Petitioner fully expects to be compelled by Respondent to carry his mining claims through administrative procedure and into the courts once again. The Respondent will undoubtedly interpret the invalidation in U.S. v. Sullivan as res adjudicata on the issue of whether Petitioner's deposit is a common variety of mineral,

30. 30 USC 21,22,26; General Mining Regulation of the Bureau of Land Mgt, 43 CFR §§ 185.1-185.3. See also: U.S. vs. Deasey, 24 F.108 (D. Idaho 1928).



which cannot be located after July 23, 1955, or a mineral with special and distinct value, exempt from the Common Varieties Act. The fact that Sullivan's claims and the discovery of the valuable mineral deposit were prior to July 23, 1955, will be virtually lost to Sullivan's predecessor in interest, Petitioner Robert Mendenhall. Absent a function for the invalidation of Sullivan's claims, if this Court confirms U.S. v. Sullivan, Respondent will have succeeded in making a mockery of the mining laws and of entrymen rights to due process of law with relation to mineral exploration and development on the public lands.

Finally, Morrissey, supra, recommends that due process be safeguarded by a factual review of the findings in administrative tribunals where required by the nature of the



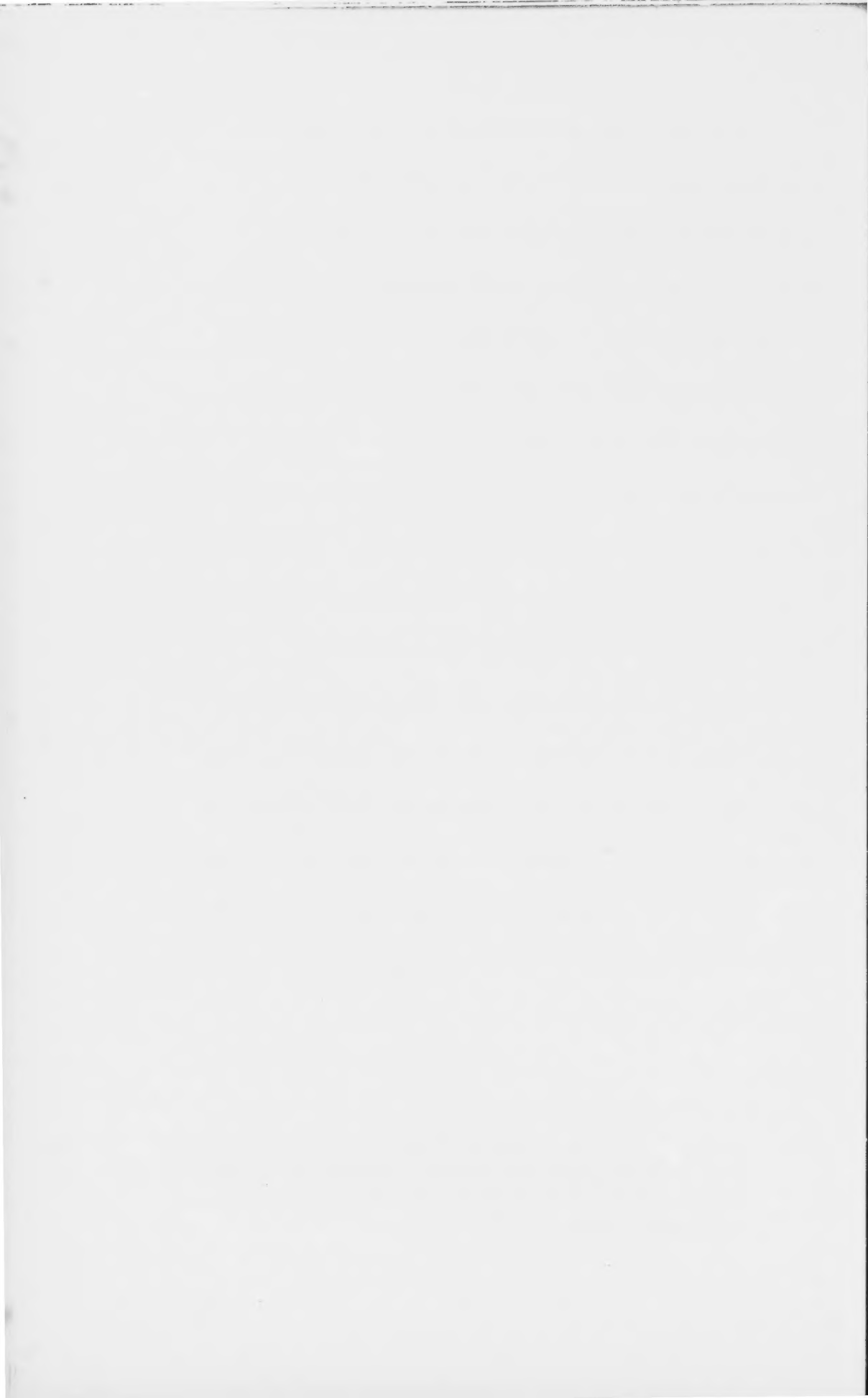
private interest affected. Without due process protection for mining claims, investors in the mineral industry are without any security for their investment in what is otherwise such a high-risk that the nation's mineral industry is being seriously curtailed.

Respondent, in its opposition to the mining laws, which it has been sworn to uphold, has become another enemy in a business fraught with enemies - weather, difficult terrain, vandals, uncertainty of sufficient quantity and quality, cyclical mineral prices and varying costs of labor and materials. The Courts have recognized the hazards in their interpretation of the law, U.S. v. Rizzinelli, supra, and the testimony of Sullivan in U.S. v. Sullivan confirms that the Charleston 24/39 claims were not free from any of these hazards.



Furthermore, respect for local custom and state law is one of the important components of the federal mining laws. Even the amount of acreage allowed within a mining claim was left to the discretion of the local mining district in the 1866 federal mining laws; and the 1872 laws left the width of a lode claim to matters of individual terrain and to the custom by which miners had marked the particular countryside and mineral deposits. In the western states, such as Nevada, the mining industry has been at the crux of economic development and in recognition of that fact, Nevada state law has long provided eminent domain rights to mining.³¹

31. Laws of Nevada, Seventh Session, Chapter LVII, "An Act to encourage the mining, milling, smelting, or other reduction of ores in the state of Nevada," approved March 1, 1875.



Refusal by the Courts below to rehear the facts in U.S. v. Sullivan will result in property loss to Petitioner, will serve no constructive function of the Interior Department, and will adversely affect the mineral industry at large. Therefore, Petitioner's rights to due process have been violated and evidentiary questions otherwise left to agency discretion must be decided in a factual hearing by the Courts.³²

32. U.S. vs. Noguiera, 403 F.2d 816 (9th Cir. 1968).

Conclusion

For these reasons, a writ of
certiorari should issue to review the
judgement and opinion of the Ninth
circuit.

Respectfully submitted,

Hale C. Tognoni

Hale C. Tognoni
100 West Clarendon, Suite 1260
Phoenix, AZ 85013
Counsel for Petitioner

APPENDIX

APPENDIX

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Supreme Court of the United States

No. A-194

ROBERT L. MENDENHALL,

Petitioner,

v.

UNITED STATES

ORDER EXTENDING TIME TO FILE PETITION FOR
WRIT OF CERTIORARI

Upon Consideration fo the application
of counsel for petitioner(s),

It Is Ordered that the time for filing
a petition for writ of certiorari in the
above-entitled cause be, and the same is
hereby, extended to and including October
26, 1984.

/s/ William H. Rehnquist
Associate Justice of the Supreme
Court of the United States

Dated this 18th
day of September, 1984



Supreme Court of the United States

No. A-194

ROBERT L. MENDENHALL,

Petitioner,

v.

UNITED STATES

ORDER FURTHER EXTENDING TIME TO FILE
PETITION FOR WRIT OF CERTIORARI

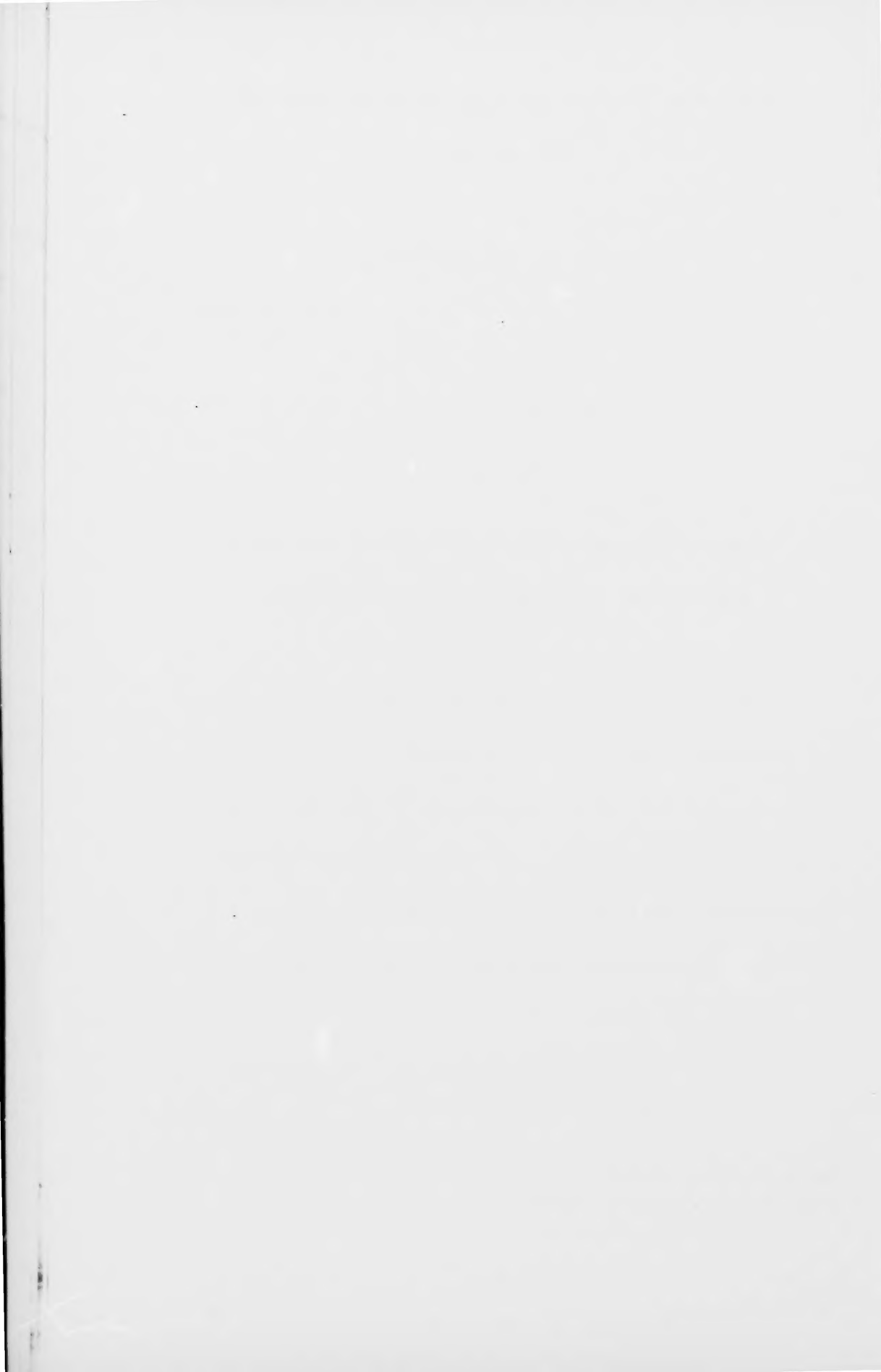
Upon Consideration fo the application
of counsel for petitioner(s),

It Is Ordered that the time for filing
a petition for writ of certiorari in the
above-entitled cause be, and the same is
hereby, extended further to and including
November 5, 1984.

/s/ William H. Rehnquist

Associate Justice of the Supreme
Court of the United States

Dated this 23th
day of October, 1984



UNITED STATES DEPARTMENT OF THE INTERIOR

OFFICE OF HEARINGS AND APPEALS

HEARINGS DIVISION

Room W-2426, 2800 Cottage Way
Sacramento, California 95825

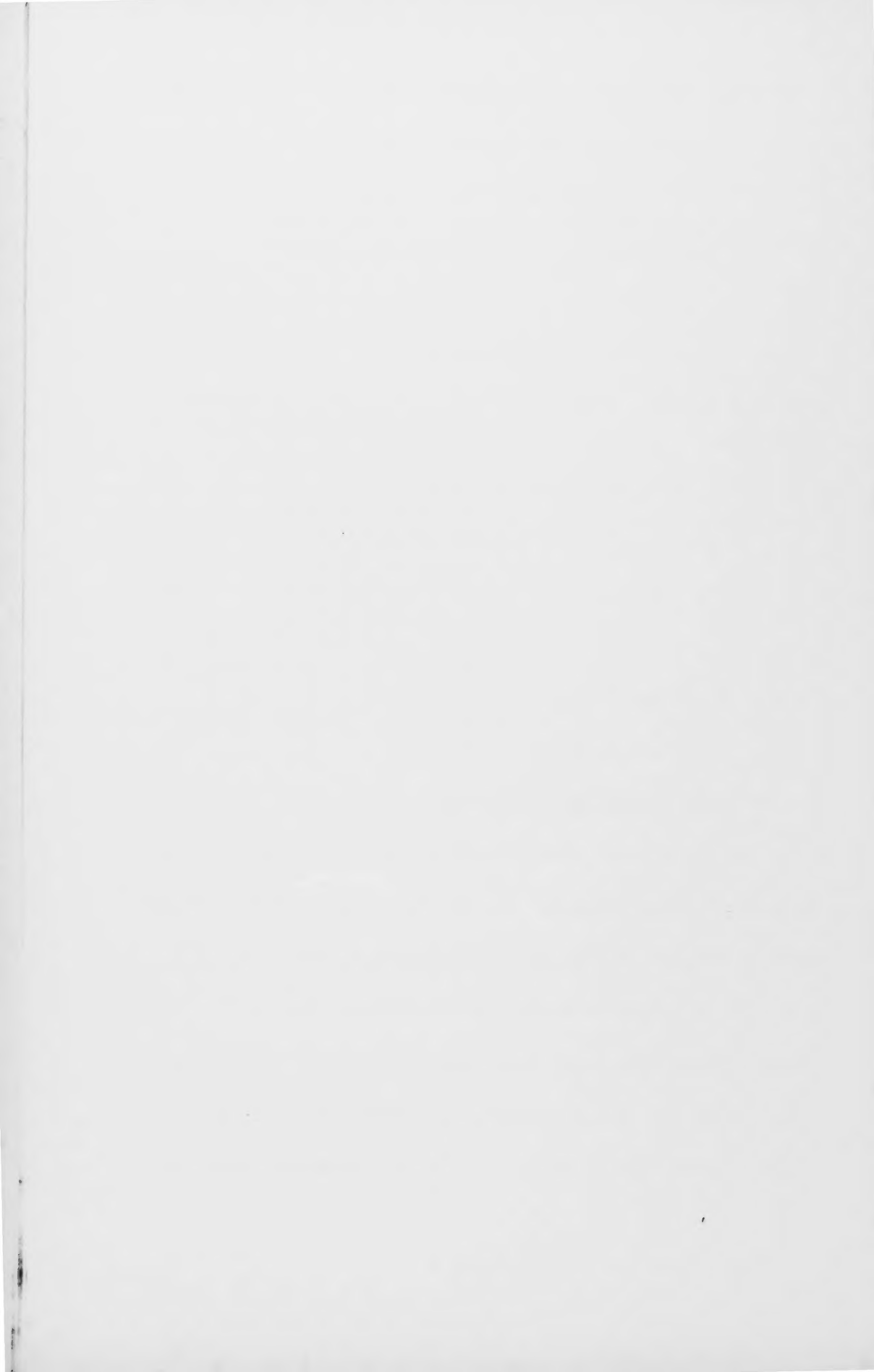
December 28, 1971

DECISION

United States of America,	:	Contest No. N-065732,
	:	<u>065733, Involving</u>
	:	Charleston No. 24 aka
Contestant	:	Charleston No. 39 and
	:	Extension 39 of the
	:	Charleston; and Char-
	:	leston Spur No. 1
v.	:	placer mining claims,
	:	located in Secs. 34,
	:	35, and 36, T. 19 S.,
	:	R. 59 E., and Sec. 3,
Frank R. Sullivan,	:	T. 20 S., R. 59 E.,
	:	M.D.M., Clark County,
Contestee	:	Nevada

MINING CLAIMS DECLARED NULL AND VOID

The manager of the Nevada Land Office initiated these contests by filing a complaint which asserts as to Charleston No. 24 placer mining claim (also known as Charleston No. 39 and referred to in this decision as Charleston 24/39), and the Charleston Spur No. 1 placer mining claim:



1. That valuable minerals have not been found within the limits of the claims so as to constitute a valid discovery within the meaning of the mining laws.
2. That no discovery of a valuable mineral has been made within the limits of the claims because the mineral materials present cannot be marketed at a profit and/or could not be marketed at a profit prior to the Act of July 23, 1955.

The contestee's answer denies the allegations of the complaint relating to lack of discovery of valuable minerals, and contends that "valuable minerals (namely; sand, gravel and/or rock) have been found within the limits of the claims and have been marketed at a profit both prior and subsequent to the Act of July 23, 1955."

A hearing in this proceeding was held in Las Vegas, Nevada on February 18, 1971. In a brief filed subsequent to the hearing the contestee advised that he concurs with the following paragraphs of the "Summary of the Evidence," included in the post-hearing

brief filed on behalf of the Bureau of Land Management:

1. The only mineral material on the two contested claims is the sand and gravel.
2. The usable sand and gravel material on the two contested claims is suitable for all general construction purposes.
3. Subject to the usual minor differences, the sand and gravel material on the two contested claims is similar to and is useable for the same general construction and building purposes as other sand and gravel deposits in the Las Vegas area.
4. The sand and gravel materials on the two contested claims constitute "common varieties of sand and gravel" within the purview of Section 3 of the Act of July 23, 1955.
5. The entire area of the Charleston No. 24/39 claim contains good quality commercial sand and gravel.

The five statements listed above are also supported by the evidence in the case record.

Mr. Thomas E. Schessler, a mining engineer, testified at the hearing on behalf of the

Bureau of Land Management. The only other witness was the contestee, Mr. Frank R. Sullivan.

Review of Evidence; Findings

Mr. Schessler has a degree in geology and at the time of the hearing had worked for the U.S. Geological Survey, private mining companies, the U.S. Forest Service, and the Bureau of Land Management for a total of approximately 19 years. Tr. 2-3. In his work as a mining engineer he had examined "around a hundred" sand and gravel claims or deposits located in nine states other than Nevada, and between twenty and thirty claims in the Las Vegas Valley. In his research on the claims in question he learned that they had been located in late February 1955 by Mr. E. H. Brawner. The contestee acquired them in 1958 or 1959 as a part of a group of more than 20 "Charleston" claims.



The two contested claims are approximately eleven miles by air or twelve miles by road northwest of Las Vegas. Tr. 10.

Mr. Schessler examined them on January 22, 1971 and February 11, 1971. Tr. 9.

Because he did not come to the Las Vegas area to work until 1967 his knowledge of the history of the claims, and activity on them during previous years was gained from a review of documents, including Bureau files, aerial photographs, and records of market sales of sand and gravel.

In 1971 Mr. Schessler found two bulldozer cuts on the east end of Charleston 24/39, with piles of sand and gravel material nearby. His impression was that none of the excavated material had been removed from the claim. In addition, there are four or five older bulldozer cuts on the western end of that claim. Tr. 11-12. The excavated material in that area "seemed all to have been in place." Tr. 12.



No pits or improvements were found on Charleston Spur No. 1. Exh. 2; Tr. 12. Most of that claim is bedrock outcrop. However, there is "probably not more than three acres" of alluvial type sand and gravel in a draw which crosses the lower part of the claim, and extends for a short distance into the upper portion. Exh. 3; Tr. 13.

From his investigation and observations, Mr. Schessler concluded that there had been no removal or marketing of materials from either of the claims. Tr. 15. He indicated, however, that it would be hard to determine whether or not there had been removal of material from a draw in the western end of Charleston 24/29. Tr. 17-18. In recent years Mr. Sullivan has constructed a road which provides access to Charleston 24/39 from the east. Tr. 17. Until that was done only the western end of

Charleston 24/39 and the southeastern portion of Charleston Spur No. 1 could be reached by road. He pointed out that a 1965 aerial photograph (Exhibit 3) shows no road coming into Charleston 24/39 from the east, and no bulldozer cuts on the eastern end.

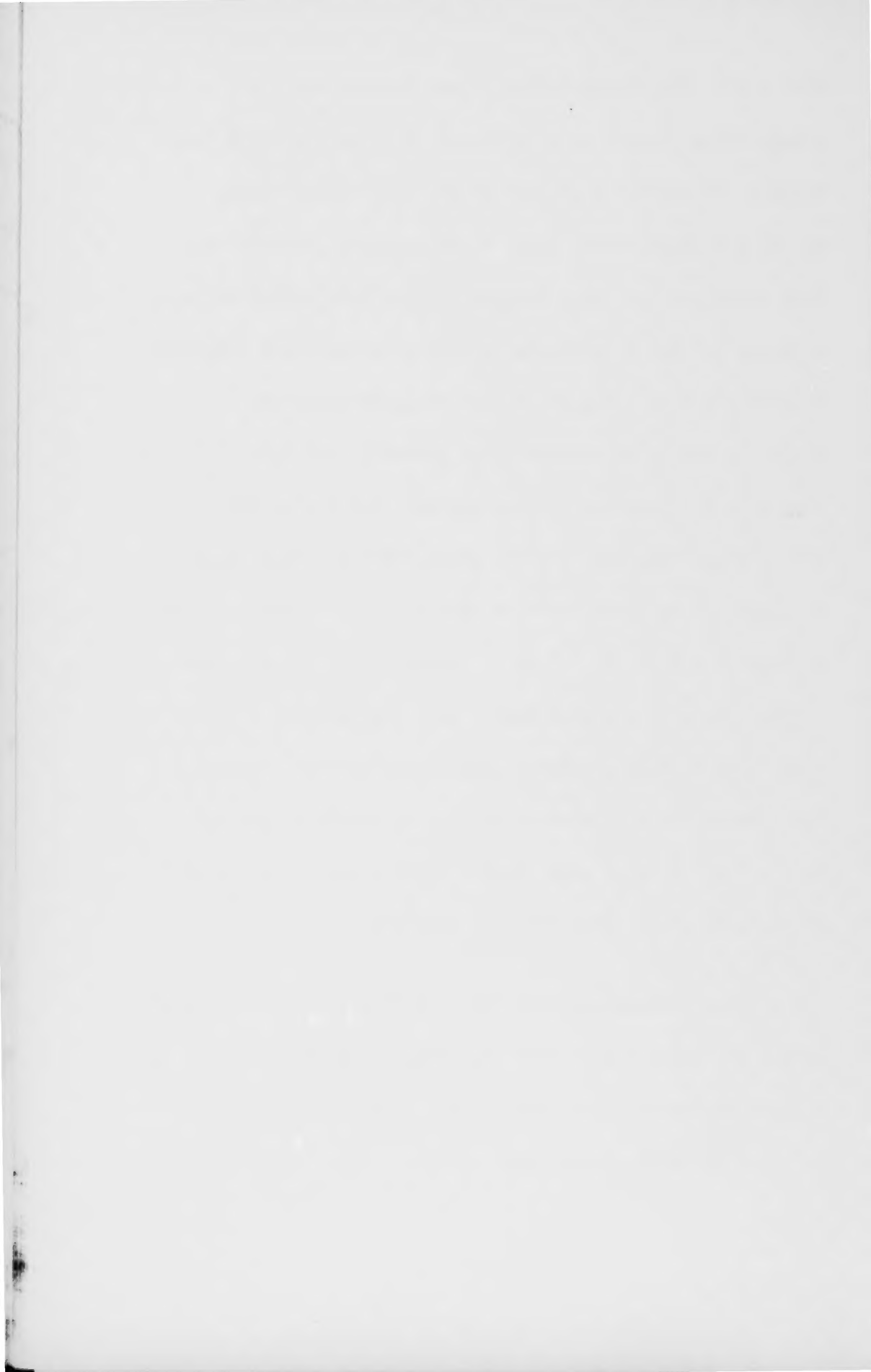
The Bureau's expert was unable to estimate the depth of the sand and gravel contained in the three acre portion of Charleston Spur No. 1. He found "essentially no sand and gravel" on the upper portion of that claim. He observed the sand and gravel deposit on Charleston 24/39 to a depth of 20 feet, and conceded that it could extend to a depth of 500 or 600 feet - - that claim could easily contain a million cubic yards. Tr. 18, 24, 49.

Mr. Schessler testified that any marketing of sand and gravel from the claims "could not have been in large quantities."



Tr. 19. He described the locations of competing sand and gravel firms in the Las Vegas Valley, and pointed out that they were between two and five miles closer to the center of Las Vegas than the Charleston claims. In his view this placed the latter claims at a competitive disadvantage. Taking into account the growth of Las Vegas, he stated that prior to July 23, 1955 the "competitive problem of haulage distance was probably more. . . than it is today." Tr. 21. As a result of his investigation he concluded that material from the two claims under consideration could not have been marketed at a profit as of July 23, 1955, and that there was no market demonstrated for those claims.

On cross examination Mr. Schessler conceded that at the time of the hearing there was a total market for sand and gravel in excess of 3,000,000 tons per year. He



acknowledged that in his 1971 inspections he found signs of removal from the 11 and 13A components of Charleston 24/39 (depicted on Exhibit 2), observing that the "evidence is slim that it was in any large quantity." Tr. 27. He insisted that there is nothing on the 1965 aerial photograph (Exhibit 3) to indicate "any substantial removal." Tr. 29, 31. He agreed that very heavy rainfall and a resulting flood could have obliterated excavations in the draws. Tr. 32.

The contestee in his testimony explained that he acquired all of the Charleston claims "on a foreclosure." Tr. 38. He transferred the Charleston 1 through Charleston 22 claims to Charleston Stone Products, but retained his interest in Charleston 24/39 and Charleston Spur No. 1. His statements relating to removal of sand and gravel were couched in very



general terms. Excavated pits from which materials were removed and which are observable on Exhibit 3 are located outside of the boundaries of the two claims involved in this contest (they may encroach to a minor extent on Charleston 24/39).

Tr. 41. Mr. Sullivan stated that he "sold an awful lot of gravel" from a wash in the western (11 and 13A) segments of Charleston 24/39. This was in 1957 or later. Tr. 36-38. He described the removals as follows:

"At that time I didn't have big equipment. I did have small loaders, so I had to take what was loose and available, and close to the road. The road went right by it, and every time a flood would come down. . . it would come right back in and fill it and I would go right back and dig it up." Tr. 43.

Two of the sand and gravel stockpiles which are "off the western boundary of Charleston 24/39 claim" were placed by Mr. Sullivan when he owned all of the Charleston claims. Tr. 44.

At the hearing the contestee produced no evidence to establish that sand and gravel had been removed and marketed from Charleston 24/39 and Charleston Spur No. 1 prior to July 23, 1955. Four unsworn statements are attached to the Contestee's Brief, filed on July 9, 1971. One states that Wheeler Freightways "hauling gravel for Mr. E. J. Braner (sic) prior to 1955 on several occasions to areas in the Valley and different business concerns." The second unsworn statement is from a construction company superintendent, and concerns a purchase of rock and gravel "in 1957-8."

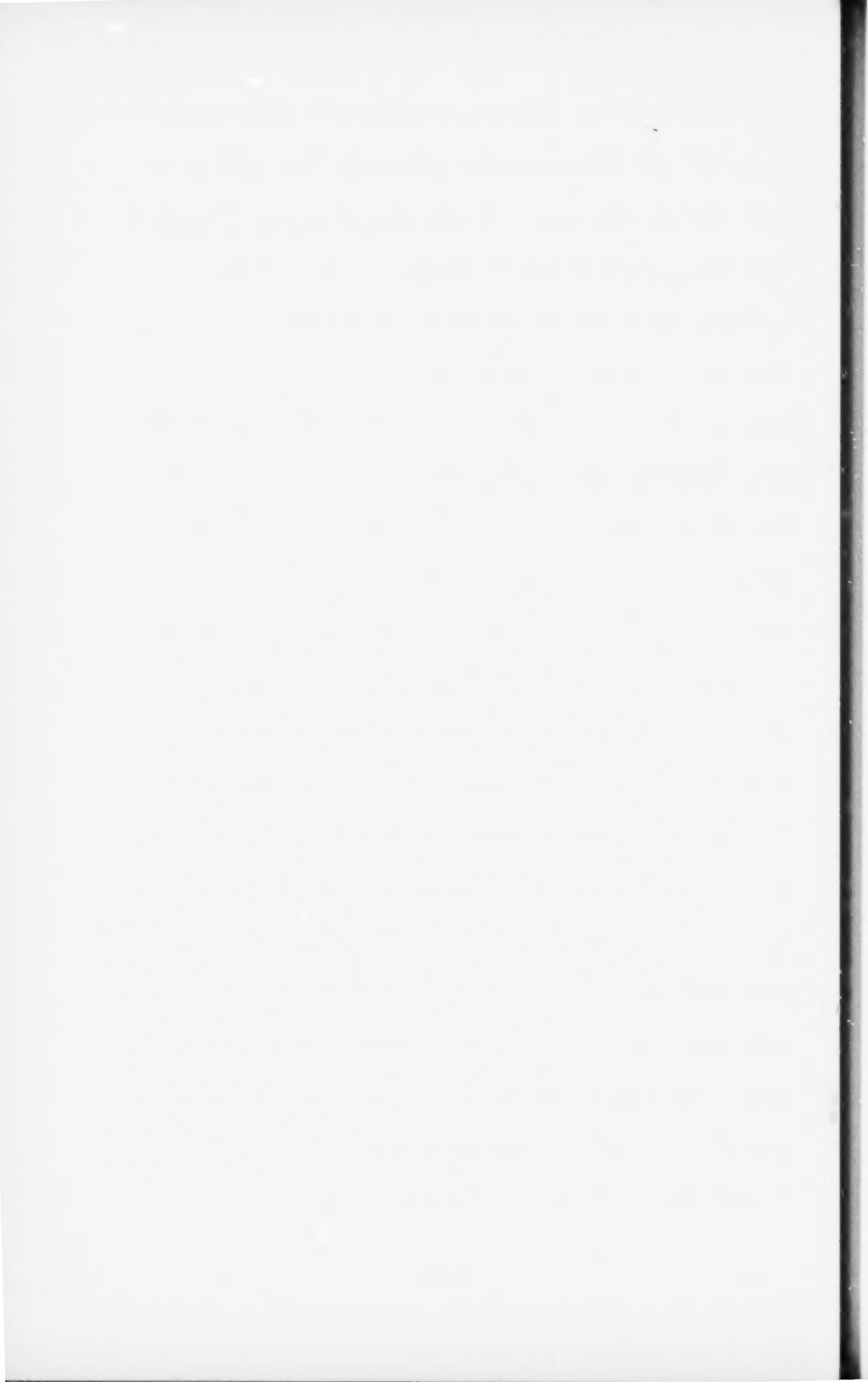
The other two unsworn statements share the basic deficiency of the two which have been described, being mere attachments to a brief filed after the hearing. However, they are the only ones which both (i) mention a time prior to July 23, 1955, and

(ii) refer to material hauled from the two claims which are the subject of this contest. One, from an employee or former employee of the North Las Vegas Street Department, advises that the signer of the statement "in 1954, 1955, 1956. . . did haul gravel from pits located in the Charleston Placer No. 24 and the Charleston Spur Placer Mining Claim. . . ." No details as to amounts paid for the gravel, if any, or as to quantities are provided. Also the statement does not furnish specific information on what happened during the five months which elapsed between the location of the claims and July 23, 1955.

The last statement, from Mrs. Hilda Pine, refers to her husband as the "original discoverer," and asserts that "gravel was sold as a business venture from Mining Claim known as Charleston Spur No. 1, and Charleston No. 24, and Charleston



No. 39." Mrs. Pine's statement discusses receipt of "monies in payment for the gravel which was sold from our mining claims," her inspection of "claims to see that things were as they were ordered by my husband," and receipt of monies each year for gravel payments [d]uring the years that Mr. Brawner was staying with me and Mr. Pine, prior to 1955" (emphasis supplied). Mr. Pine was one of the locators of the Charleston Nos. 1 through 22 placer claims (see p. 2 of Hearing Examiner's October 30, 1970, decision in Contest Nos. N-065729-A-Q and N-065731-A-B in which Charleston Stone Products, Inc., is the contestee), but exhibits 4, 4A, 5 and 5A in this (the Sullivan) contest show that he was not a locator of Charleston 24/39 or Charleston Spur No. 1. This fact, plus Mrs. Pine's reference to receipt of monies prior to 1955, indicate that she is confused as to claim boundaries and names.



Considered in its entirety, her statement is far more consistent with removals from one or more of the claims which had been located in 1942 by Mrs. Pine's husband and A.M. Murphy (Charleston Nos. 1-22) than it is with the asserted sales from Charleston Spur No. 1 and Charleston 24/39. It is noted that the Hearing Examiner's decision which is cited in this paragraph found that "Mr. Brawner was operating from Claim 10 and was utilizing material from Claim 9 in 1955 at the rate of approximately 5000 yards a year," and that within Claim 9 and Claim 10 "there is in excess of 1,000,000 yards of usable material."

Charleston Stone Products, Inc., contends that it is the owner of the 11 and 13A portions of Mr. Sullivan's Charleston 24/39 claims (see Exhibit 2). Therefore, the testimony of a "number of witnesses" in the Charleston Stone Products (the subject of

the above-titled Hearing Examiner's decision), describing "the Brawner operation on the claims between 1954 and 1958" is of some interest. The findings in that decision would seem to be at least as reliable as the allegations in the unsworn statements attached to the contestee's brief.

The Hearing Examiner found:

"There was no active operation on any of the remaining claims on July 23, 1955, [the reference is to all claims involved other than Charleston Nos. 9 and 10, and includes the overlapping 11 and 13A portions of Charleston 24/39] and the occasional utilization of material from these claims prior to and after that date was not connected with the Brawner operation. Also there was no probative evidence that the deposit on any of these latter claims could have been operated profitably in competition with the many other potential deposits in the Las Vegas Valley on the critical date"

Conclusions and Decision

Upon the establishment of a prima facie case by the Government, the burden shifts to the mining claimant to show by a

preponderance of evidence that a discovery of valuable minerals has been made. United States v. Patee et al. A-28731 (May 7, 1962).

A recent decision, United States v. Clear Gravel Enterprises, Inc. IBLA 70-15 (May 2, 1971), summarizes the legal principles which govern this proceeding as follows:

"The basic principles of law. . . are now well established and need no extensive elaboration. For a mining claim to be valid there must be discovered on the claim a valuable mineral deposit. A discovery exists

[W]here minerals have been found and the evidence is of such a character that a person of ordinary prudence would be justified in the further expenditure of his labor and means, with a reasonable prospect of success in developing a valuable mine. . . . Castle v. Womble, 19 L.D. 455, 457 (1894); United States v. Coleman, 390 U.S. 599 (1968).

"This test, the prudent man rule, has been refined to require a showing that the mineral in question can be extracted, removed and

presently marketed at a profit, the so-called marketability test.

United States v. Coleman, supra.

This present marketability can be demonstrated by a favorable showing as to such facts as the accessibility of the deposit, bona fides in development, proximity to market, and the existence of a present demand. The marketability test has been specifically held to be applicable in determining the validity of sand and gravel claims in the Las Vegas area. Palmer v. Dredge Corporation [398 F. 2d 791 (9th Cir. 1968), cert. den., 393 U.S. 1066 (1969)]; Foster v. Seaton, 271 F.2d 836 (D.C. Cir. 1969); Osborne v. Hammit, Civil No. 414 (D. Nev., August 19, 1964).

"Furthermore, since Congress withdrew common varieties of sand and gravel from location under the mining laws on July 23, 1955 (30 U.S.C. §611 (1964)), it is incumbent upon one who located a claim prior to that date for a common variety of sand and gravel to show that all the requirements for a discovery, including a showing that materials could have been extracted, removed and marketed at a profit, had been met by that date. Palmer v. Dredge Corporation [cited above]; United States v. Barrows, 404 F.2d 749 (9th Cir. 1958), cert. den., 394 U.S. 974 (1969).

The Clear Gravel Enterprises decision also holds that to satisfy the marketability



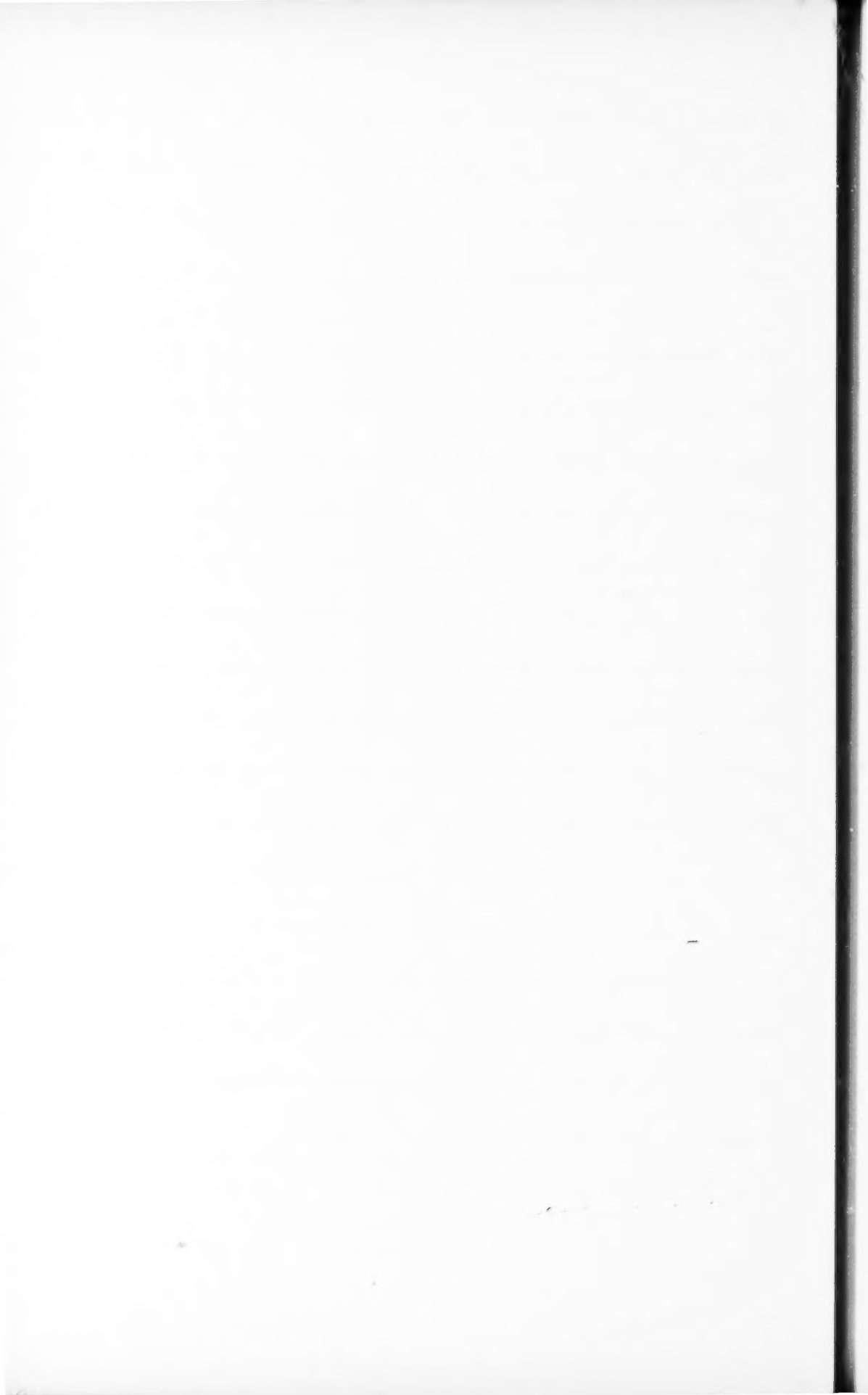
test for minerals of widespread occurrence, it is not enough to show that there is a general demand for the type of material in question -- it must be shown that the mineral from the particular deposit could have been extracted, sold and marketed at a profit. The decision also quotes extensively from Osborne v. Hammit, supra. A portion of the quoted material from the latter decision is as follows:

"the record discloses a situation where, if the Bradford Claims could be sustained on the hypothetical and speculative opinion evidence relied upon by the plaintiffs, each of the claims in the valley comprising over 100,000 acres might be separately validated on the same sort of theoretical evidence. The end result would be that 100,000 acres of public land would have been patented as valuable for mining, where it is evident and shown by the record that not more than one percent of the material might have been marketable in the reasonably foreseeable future."

The Court observed also that the plaintiffs had "failed to enter the race" to supply the theoretical insufficiency of sand and

gravel, and that if they had done so they would have demonstrated present demand and given an indication that they intended to develop the claims in good faith.

Mr. Schessler's testimony and Exhibit 3, the aerial photograph, establish a prima facie case that there was no production or sale of sand or gravel from Charleston 24/39 and Charleston Spur No. 1 on or prior to July 23, 1955. The excavated pits on Charleston Nos. 9 and 10 are corroborative of the Hearing Examiner's finding (in the October 30, 1970 decision relating to the Charleston claims which Mr. Sullivan did not retain) that Mr. Brawner's sand and gravel operation and utilization of materials during 1955 and prior years involved Charleston Nos. 9 and 10, not the two which are the subject of this contest (located by Brawner in late February, 1955). Mr. Brawner had 27 Charleston claims

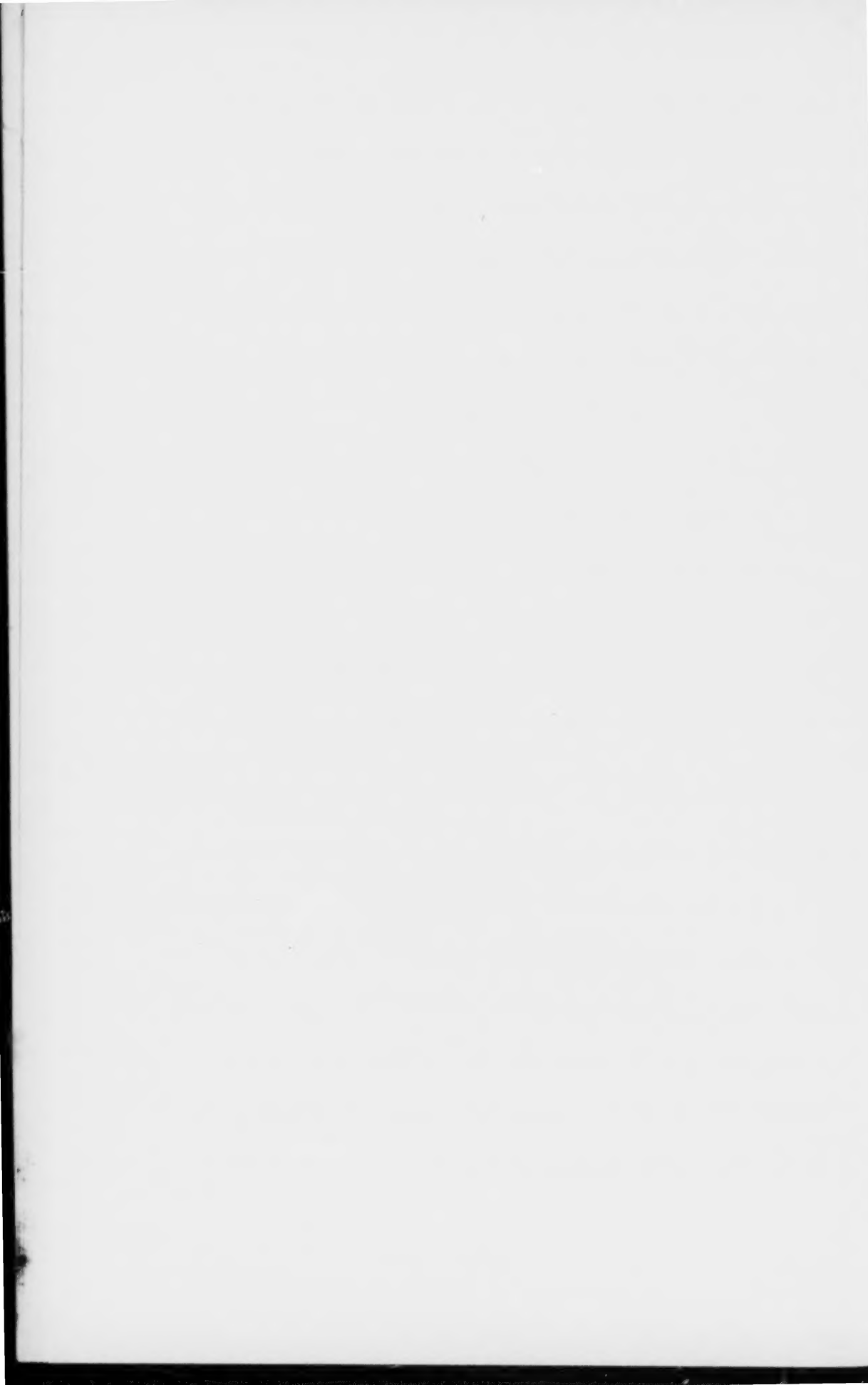


available at that time, but was disposing of relatively minor quantities of sand and gravel. The case record provides no support for an assumption that he moved from the Charleston Nos. 9 and 10 claims to either Charleston 24/39 or Charleston Spur 24/39 at any time during, or prior to, 1955.

The contestee's brief asserts that in the event marketing from the contested claims did not occur prior to July 23, 1955, the criteria is "could have been marketed" at a profit prior to that date. Then, noting the contestee's testimony that he marketed materials from the two claims at a profit in years subsequent to 1955, the brief argues that this is an indication "that the materials were within the province of the definition of marketable material." But this leads one directly to an inquiry as to why sand and gravel from Charleston 24/39

and Charleston Spur No. 1 would have been utilized to satisfy a limited demand in preference to sand and gravel from the other Charleston claims. The demand was limited due to the existence of established sand and gravel operations which were closer to the City of Las Vegas. The few thousand yards of material sold annually by Mr. Brawner in those years satisfied the demand, and cannot be spread around to validate all of the Charleston claims. This contest provides an example of a failure "to enter the race" as mentioned in Osborne v. Hammit, supra.

A mining claimant does not meet his burden of proof, once the Government has presented a prima facie case, by presenting only infirm or inconsistent recollection rather than adequate records or other reliable means of proof. Accord, United States v. E.A. Barrows and Esther Barrows, A-31023



(November 28, 1969). The contestee has failed to show by the preponderance of the evidence (i) that any quantity of sand and gravel actually was marketed from the contested claims prior to July 23, 1955, or (ii) that under known marketing conditions, there was an outlet for profitable disposal of a substantial quantity of sand and gravel from the two contested claims prior to July 23, 1955. Therefore, the Bureau has sustained the charge that no discovery of a valuable mineral has been made within the limits of the claims because the mineral materials present could not be marketed at a profit prior to the Act of July 23, 1955. In view of this holding there appears to be no necessity for rulings on the other charges contained in the complaint. The Charleston 24/39 and Charleston Spur No. 1 placer mining claims are hereby declared null and void.

An appeal from this decision may be taken to the Board of Land Appeal, in accordance with the regulations of 43 CFR Part 4, published in 36 F.R. 7185-7208, April 15, 1971 (Subpart E contains special rules applicable to public land appeals). If an appeal is taken the notice of appeal must be filed in this office (not with the Board) in order to facilitate transmittal of the case file to the Board. If the procedures set forth in the regulations are not followed, an appeal is subject to dismissal.

Dean F. Ratzman
Hearing Examiner

Distribution:

Otto Aho, Field Solicitor, U.S. Department of the Interior, Room 2004, Federal Building, 300 Booth Street, Reno, Nevada 89502 (Cert.)

Robert J. McNutt, Agent for Contestee, 5636 West Charleston Boulevard, Las Vegas, Nevada 89101 (Cert.)

Frank Sullivan
Box 3186 Las Vegas, Nevada 89114 (Cert.)

Standard Distribution

Enclosure: Regulations relating to appeals procedures

United States Department of the Interior

OFFICE OF HEARINGS AND APPEALS

INTERIOR BOARD OF LAND APPEALS

4015 Wilson Boulevard
Arlington, Virginia 22203

UNITED STATES

v.

FRANK R. SULLIVAN

IBLA 72-273

Decided February 6, 1973

Appeal from a decision by Administrative Law Judge Dean F. Ratzman declaring mining claims null and void. (Contest Nos. N-065732 and N-065733.

Affirmed.

Administrative Procedure: Hearings--Constitutional Law

In an administrative proceeding to determine the validity of a mining claim, there is no denial of due process for lack of representation by a member of the bar. Due process

1. The change of title of the hearing officer from "Hearing Examiner" to "Administrative Law Judge" was effectuated pursuant to order of the Civil Service Commission, 37 F.R. 16787 (August 19, 1972).

in such cases envisages notice and an opportunity for a hearing.

APPEARANCES: Keith C. Hayes, Esq., of Las Vegas, Nevada, for the appellant; Otto Aho, Esq., Field Solicitor, United States Department of the Interior, Reno, Nevada, for the appellee.

OPINION BY MR. FISHMAN

Frank R. Sullivan has appealed to the Board of Land Appeals from a decision by an Administrative Law Judge dated December 28, 1971, which declared appellant's mining claims to be null and void.

The mining claims in issue were the Charleston No. 24 (also known as the Charleston No. 39 and Extention 39 of the Charleston) and the Charleston Spur No. 1. The claims are situated approximately 12 miles from Las Vegas, Nevada and were located for sand and gravel in February of 1955.



Appellant does not challenge the findings of fact or conclusion of law reached by the Judge. Instead, counsel for appellant argues that principles of due process require the decision of December 28, 1971, to be set aside and appellant to be given another opportunity to present his case. In support of this position, counsel for appellant states that appellant was represented by Robert J. McNutt at the hearing, that McNutt was not a lawyer, and that neither the appellant nor McNutt was aware of appellant's burden or proof at the hearing.

In United States v. Charles D. and Jeanne D. Haas, A-30654 (February 16, 1967), the appellants therein, whose mining claim was declared invalid, similarly argued on appeal that due process required their case to be remanded for a new hearing. The Department stated:

The appellants contend that it was an "abuse" of due process to allow them to present their case without aid of legal counsel. They suggest generally that their case could have been presented at the hearing in a more effective manner had they had benefit of legal counsel. This may be true. However, there was nothing that prevented the appellants from being represented by proper legal counsel. Department regulations permit a party to be represented at a hearing by proper legal counsel (see 43 CFR Part 1 [now codified as 43 CFR 1.3] and 43 CFR 1850-0-6(3)(4)), but there is nothing to require such representation.

In an administrative proceeding to determine the validity of a mining claim, there is no denial of due



process for lack of representation by proper legal counsel. Due process in such case implies notice and a hearing. Orchard v. Alexander, 157 U.S. 372, 383 (1895); Cameron v. United States, 252 U.S. 450, 460 (1920); Best v. Humoboldt Placer Mining Co., 371 U.S. 334, 338 (1963). * * *

For similar results, see United States v. Raymond Bass, Betty Yeck, et. al., 6 IBLA 113, 117 (1972) and United States v. William A. McCall and R.J. Kaltenborn, 1 IBLA 115, 121, (1970).

In the case at bar, appellant was properly notified of the contest proceedings which were initiated to challenge the validity of his mining claims. Appellant was also afforded a fair hearing. It was he who chose not to engage the services of a lawyer at the time of the hearing when

his rights were at stake. He may not now be heard to complain.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed.

Frederick Fishman,
Member

We concur:

Newton Frishberg,
Chairman

Edward W. Stuebing,
Member

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Mr. Schessler said that he had personally inspected the two claims on January 22, 1971, and February 11, 1971. A geologist from his office had accompanied him on the first inspection trip; Mr. Schessler had been alone during the second trip. He testified that he had driven onto the claims in a four-wheel drive vehicle. In particular, he had been looking for "improvements." He had found the two major bulldozer cuts. However, he reported that all of the materials that had been excavated seemed to be piled up near the cuts. Little or none appeared to have been removed.

The gravel deposits on the claims were described by Mr. Schessler as partly bank gravel, and the remainder as stream gravel. He said they were similar to other limestone-dolomite deposits in the Las Vegas Valley. The witness reiterated that neither his aerial photograph study nor his

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UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

ROBERT L. MENDENHALL,

Plaintiff, CV-R-80-146-ECR

vs.

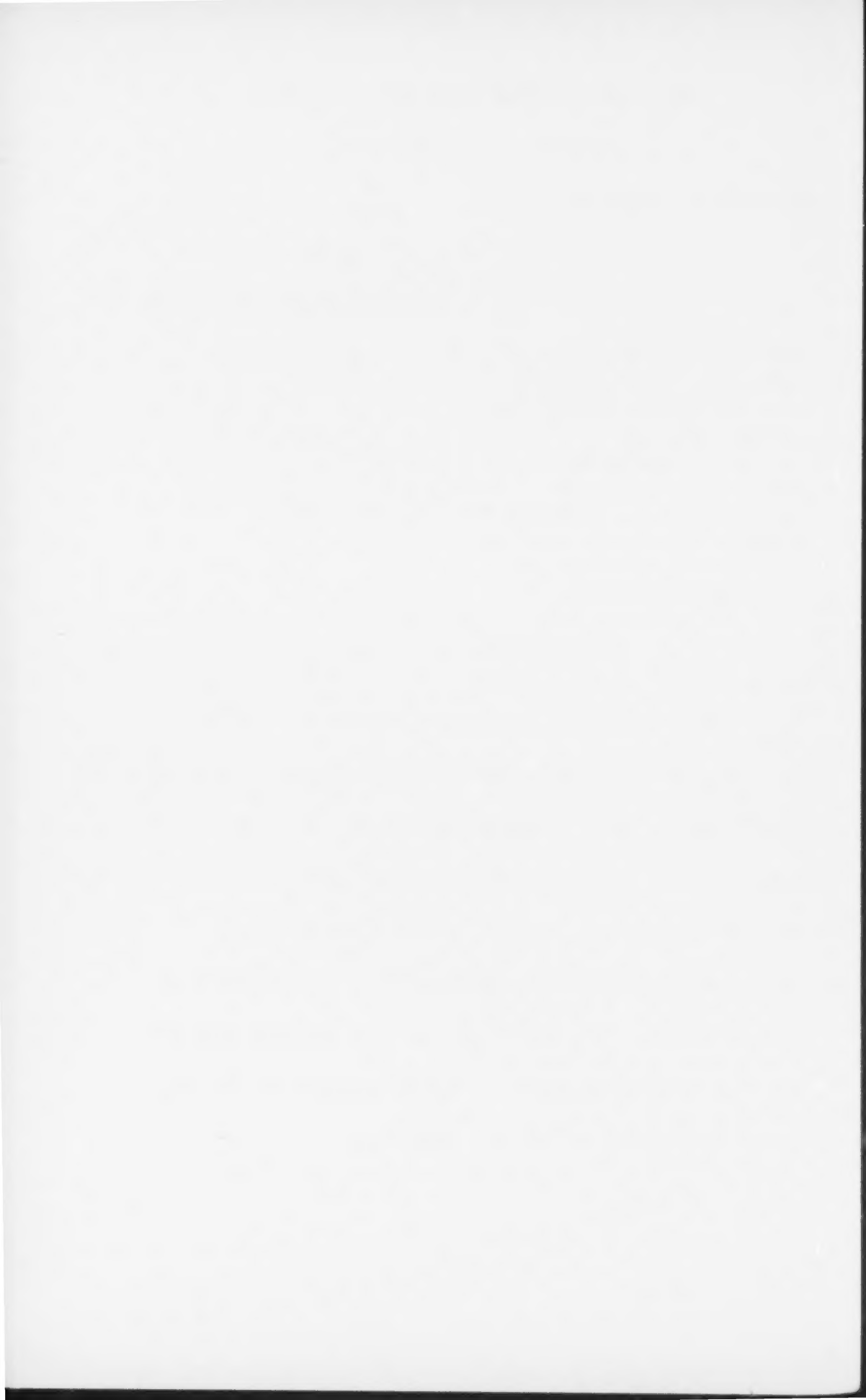
MEMORANDUM DECISION

THE UNITED STATES OF
AMERICA, THE UNITED
STATES DEPARTMENT OF
INTERIOR, an
CECIL D. ANDRUS,
Secretary of the
Interior and EDWARD F.
SPANG, State Director
of Nevada Bureau of
Land Management,

AND ORDER

Defendants.
_____ /

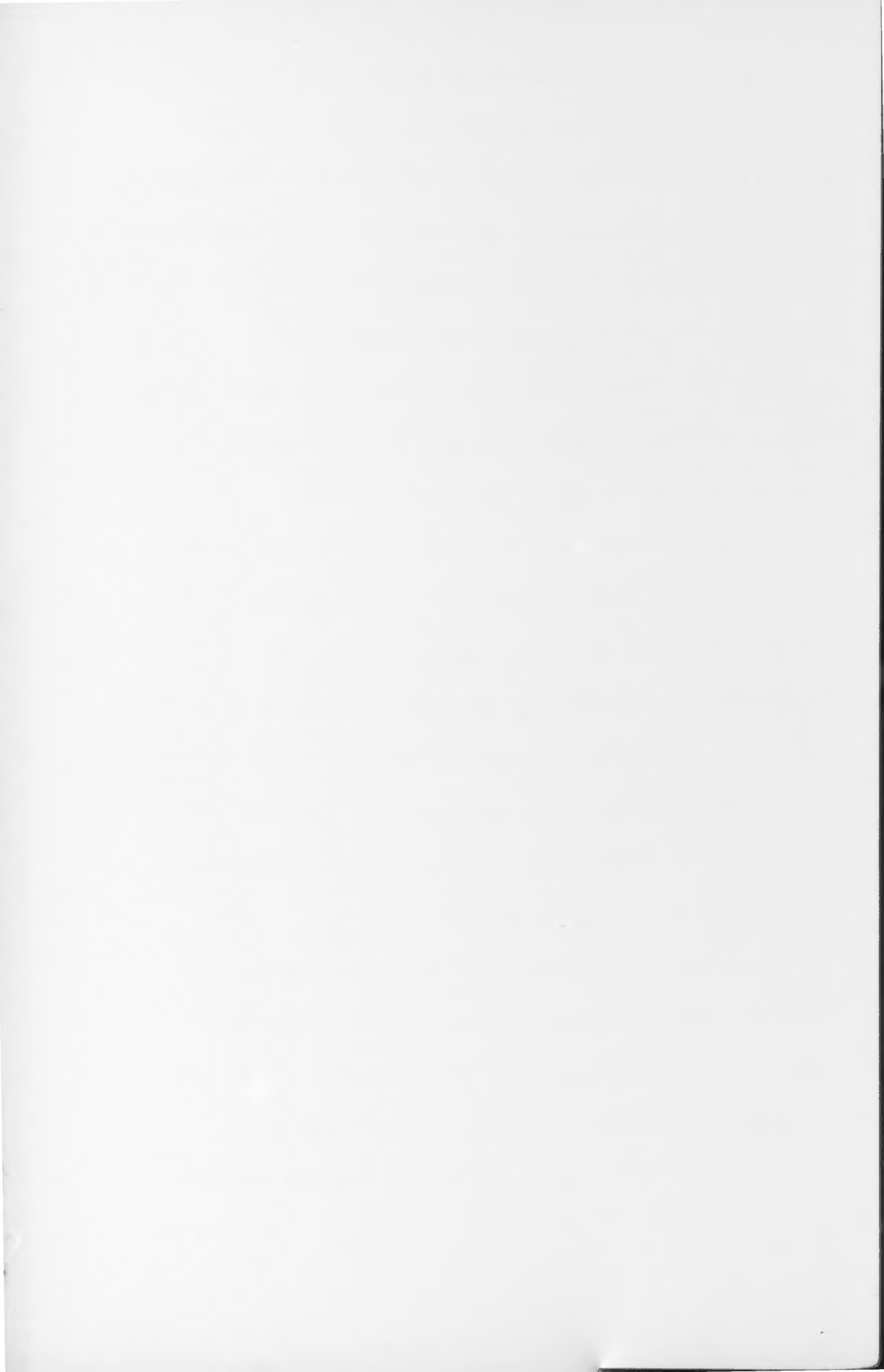
This matter has come before the Court by reason of the plaintiff's objections to the report and recommendation of U.S. Magistrate Phyllis H. Atkins, which was filed March 31, 1982. The report and recommendation was made after considering the plaintiff's motion to set aside agency action and the motion to dismiss of defendant United States of America.



This Court has made a de novo determination as to the portions of the Magistrate's report and recommendation that the plaintiff has objected to. The entire record before the Magistrate has been studied, oral argument was heard on August 9, 1982, and additional evidence and legal briefs submitted post-hearing by leave of Court have been examined.

In February of 1955, predecessors in interest of the plaintiff located two placer claims (often referred to as Charleston 24/39 and Charleston Spur No. 1) in Clark County, Nevada. Notices of location were duly recorded in the Office of the County Recorder. The claims covered deposits of sand and gravel.

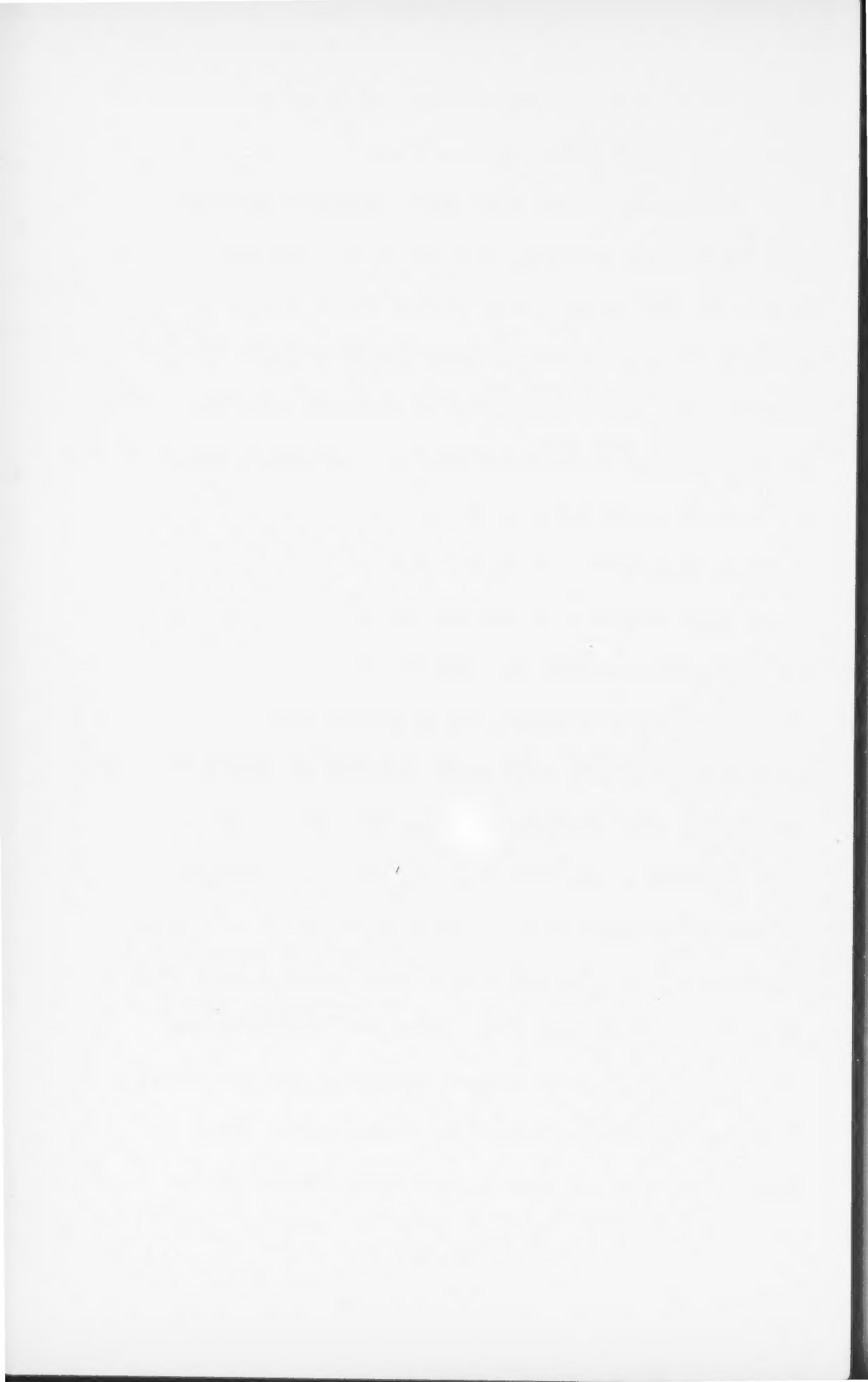
Congress subsequently enacted 30 U.S.C. §611, which declared that common varieties of sand and gravel would not be deemed valuable minerals after July 23, 1955, so that they could not serve as the



basis for any mining claim located subsequent to that date.

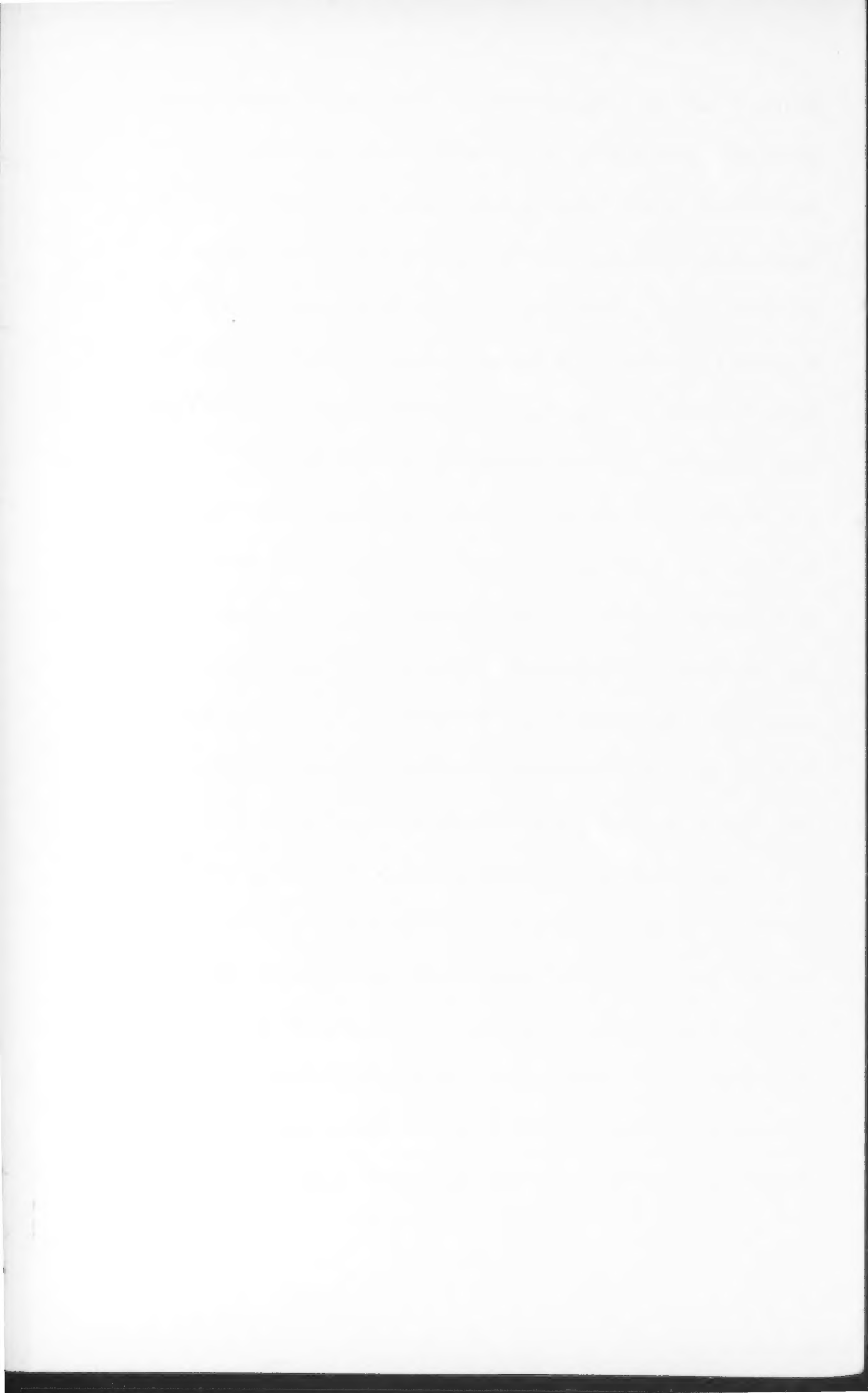
Possession of the two subject claims was obtained through foreclosure by Mr. Frank R. Sullivan, in 1959. The United States filed a complaint, in November 1965, contesting the validity of mining claims. Essentially, the Government contended that no valuable minerals were found within the claims because the sand and gravel had not been and could not be marketed profitably on or before July 23, 1955.

Acting pursuant to a power-of-attorney, civil engineer Robert J. McNutt answered the complaint for Mr. Sullivan. The Nevada land office of the U.S. Bureau of Land Management, Department of Interior, declared the claims null and void. One of the reasons given was that Mr. McNutt had not qualified, as a non-lawyer, to practice before the Department of Interior. Mr. McNutt filed an appeal of the decision on

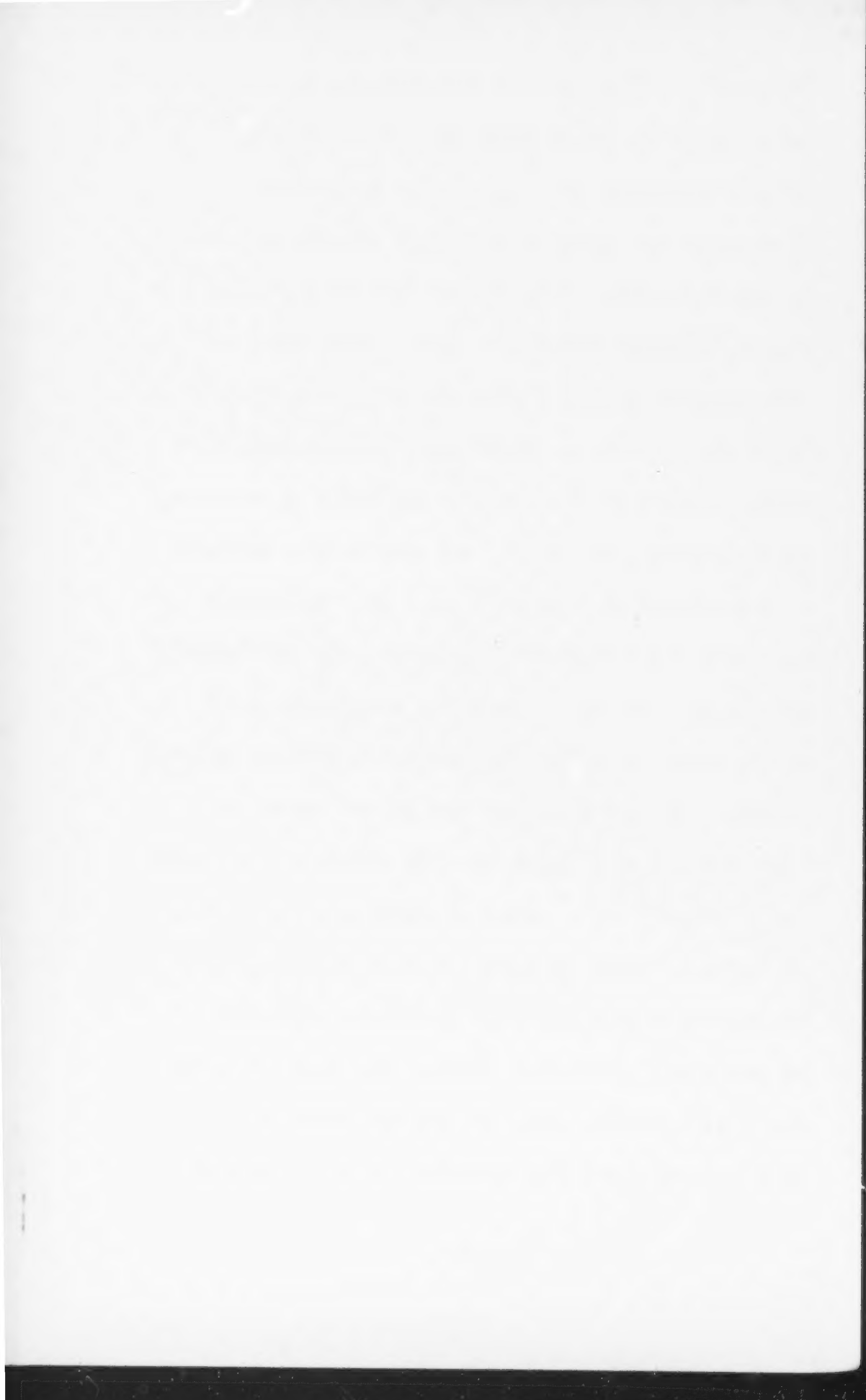


behalf of Mr. Sullivan. The Department, by letter dated May 22, 1967, advised Mr. Sullivan that the appeal was subject to dismissal because his agent and attorney-in-fact, Mr. McNutt, still had not shown himself qualified to practice before the Department. The letter even stated: "From the nature of the showing which he has attempted to make, it is obvious that Mr. McNutt is not qualified to practice before the Department." Nevertheless, it went on to advise: "However, the Department has adopted the practice of accepting appeals filed by an attorney-in-fact when his action has been ratified by the appellant."

Mr. Sullivan executed a formal ratification form before a notary public, in which he ratified and adopted the documents which had been filed on his behalf by Mr. McNutt. They had been entitled "Answer to Complaint", "Additional Showing as Required", "Notice of Appeal" and



"Appeal". The letter accompanying the ratification form gave Mr. Sullivan's return address as "Albright & Heaton, Attorneys at Law, 300 Title Insurance & Trust Building, 309 South Third Street, Las Vegas, Nevada 89101." The Department thereupon remanded the case to Hearing Officer (later renamed Administrative Law Judge) Dean F. Ratzman. He held a hearing on February 18, 1971, at which Mr. McNutt represented Mr. Sullivan. Mr. Sullivan testified on his own behalf. He already had seen the Government's proposed exhibits, and told Mr. Ratzman that they didn't reflect about \$15,000 worth of work he (Sullivan) had done on the claims, nor did they show" . . . what I have done in order to market this gravel." The Hearing Officers admitted the exhibits without objection, with the understanding that Mr. Sullivan could testify as to what he had done to market the gravel, and he and Mr.



McNutt could mark up the exhibits to illustrate other work that had been done, as revealed by testimony.

The Government's witness before the Hearing Officer was Thomas E. Schessler, a mining engineer and lands and minerals staff officer with the Las Vegas District of the Bureau of Land Management. He testified that, during the four years he had been stationed in Las Vegas, he had inspected twenty to thirty sand and gravel claims in the Las Vegas Valley. He also had studied a United States Geological Survey publication on Clark County and had researched work done by predecessor mining engineers in the Las Vegas office. Further, he had examined a mosaic aerial photograph of the area in which Mr. Sullivan's two claims were situate. The picture taking had occurred during an April 15, 1965, flight.



ground inspections revealed the removal of any significant amounts of materials.

On cross-examination by Mr. McNutt, Mr. Schessler acknowledged that he had been in the Las Vegas area only since 1966. As a result, his knowledge of sand and gravel sales in the area had been derived from a review of market sales. He conceded that large quantities of sand and gravel had been removed from land bordering Mr. Sullivan's claims.

Mr. Sullivan then testified on his own behalf. He said that he had had a rock crusher on the claims until 1957. Processing of the materials extracted had been done in North Las Vegas, where they had been taken by truck. All of the materials had been taken from a draw or wash, where they had been deposited during times of flood. Mr. Sullivan reported that a major flood had occurred in 1958. He believed that the new materials deposited by that



flood could have covered all evidence of the excavating work he had done previously.

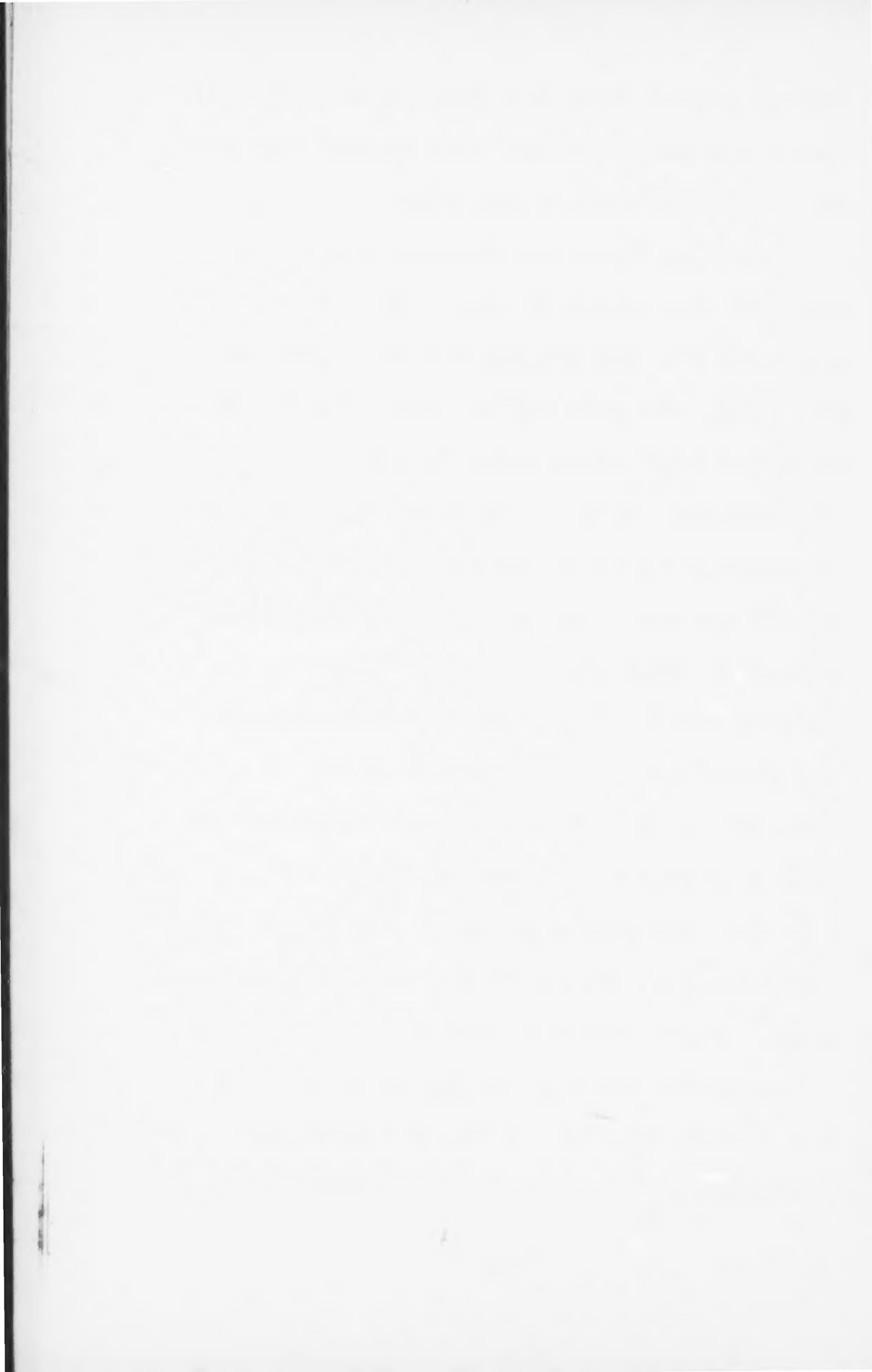
Mr. Schessler then was called back to the stand. He testified that characteristic color patterns would show in an aerial photograph of an area where an excavation had been followed by new flood deposits. Such color patterns are caused by the new growths of vegetation on those deposits. The aerial photograph of the two claims did not exhibit the characteristic color patterns that would support Mr. Sullivan's belief, in the expert witness' opinion. Nevertheless, he did not rule out the possibility that a subsequent flood could have obliterated Mr. Sullivan's excavations in the draw.

Hearing Examiner Ratzman authorized the filing of post-hearing briefs by both sides. Attached to the brief filed on behalf of Mr. Sullivan were four unsworn statements from third parties re the haul-

ing of gravel from his two claims. Two of the statements claimed that gravel had been hauled prior to July 23, 1955.

Hearing Examiner Ratzman's written decision was dated December 28, 1971. It declared the two mining claims to be null and void. He pointed out that the evidence revealed that there were large quantities of sand and gravel within the two claims; Charleston 24/39 alone could easily contain a million cubic yards. Further, he discussed in some detail the evidence as to whether sand and gravel had been removed and marketed from the claims prior to July 23, 1955. This evidence included the four aforementioned statements.

Mr. Ratzman's decision set forth the principles by which he had judged the case. First the Government had the burden of establishing a prima facie case. Then the burden shifted to the claimant, Mr. Sullivan, to show by a preponderance of



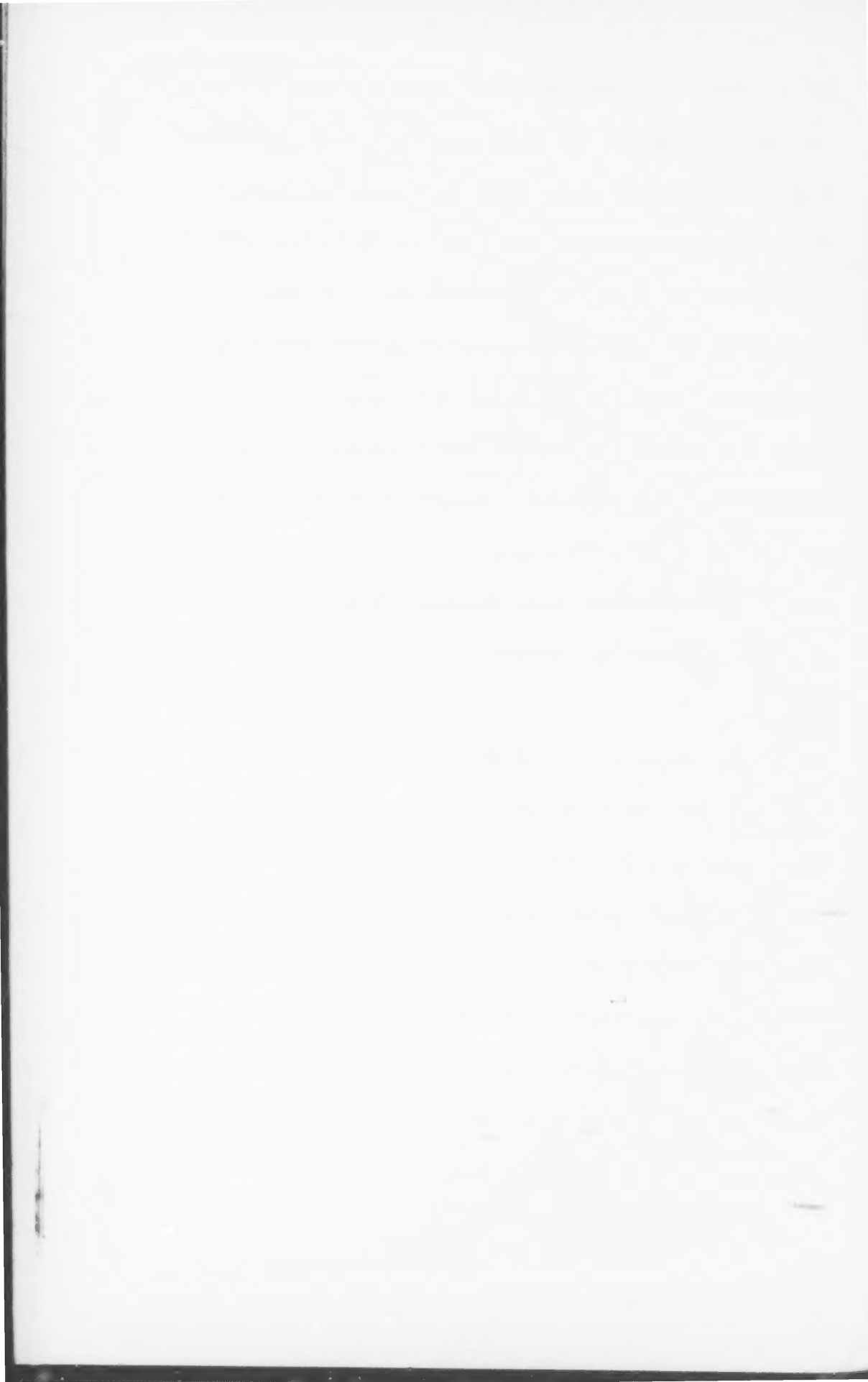
evidence that a discovery of valuable minerals had been made. This required evidence demonstrating that a person of ordinary prudence would be justified in the further expenditure of his labor and means, with a reasonable prospect of success in developing a valuable mine. Further, Mr. Ratzman's decision acknowledged that the "marketability test" had to be met. This necessitated evidence "showing that materials could have been extracted, removed and marketed at a profit" by July 23, 1955.

One way to make the showing would be for the claimant to present evidence that he had entered the race to supply the local demand for sand and gravel. The Hearing Officer found that the only significant utilization of sand and gravel prior to said date had been from nearby claims, but not from the two claims here involved. He stated that the limited demand for those materials had been readily satisfied from



existing sand and gravel operations. The decision summed up his reasons for finding the two claims null and void as follows: "The contestee has failed to show by the preponderance of the evidence (i) that any quantity of sand and gravel actually was marketed from the contested claims prior to July 23, 1955, or (ii) that under known marketing conditions, there was an outlet for profitable disposal of a substantial quantity of sand and gravel from the two contested claims prior to July 23, 1955."

Mr. Sullivan retained attorney Keith C. Hayes to appeal the decision of Hearing Officer Ratzman. Mr. Hayes' primary contention was that due process required the decision to be set aside and that Mr. Sullivan be given another opportunity to present his case, in order that additional evidence might be considered. The reason given for this argument was the representation of Mr. Sullivan by non-



lawyer Mr. McNutt before the Hearing Examiner. Attorney Hayes argued that neither Sullivan nor McNutt had been aware of the burden of proof imposed upon the claimant at the time of the hearing.

The appeal was considered by a three-man panel of the Interior Board of Land Appeals (IBLA), which affirmed the Hearing Officer's decision on February 6, 1973, in an unanimous opinion. It pointed out that Department of Interior regulations permitted a claimant to be represented by a lawyer, but did not require such representation. The opinion declares that in an administrative proceeding to determine the validity of a mining claim there is no denial of due process because the claimant is not represented by a lawyer; all that due process implies is notice and a hearing. The panel emphasized that Mr. Sullivan chose not to engage the services of a lawyer for the hearing, so that he "may not now be heard to complain."

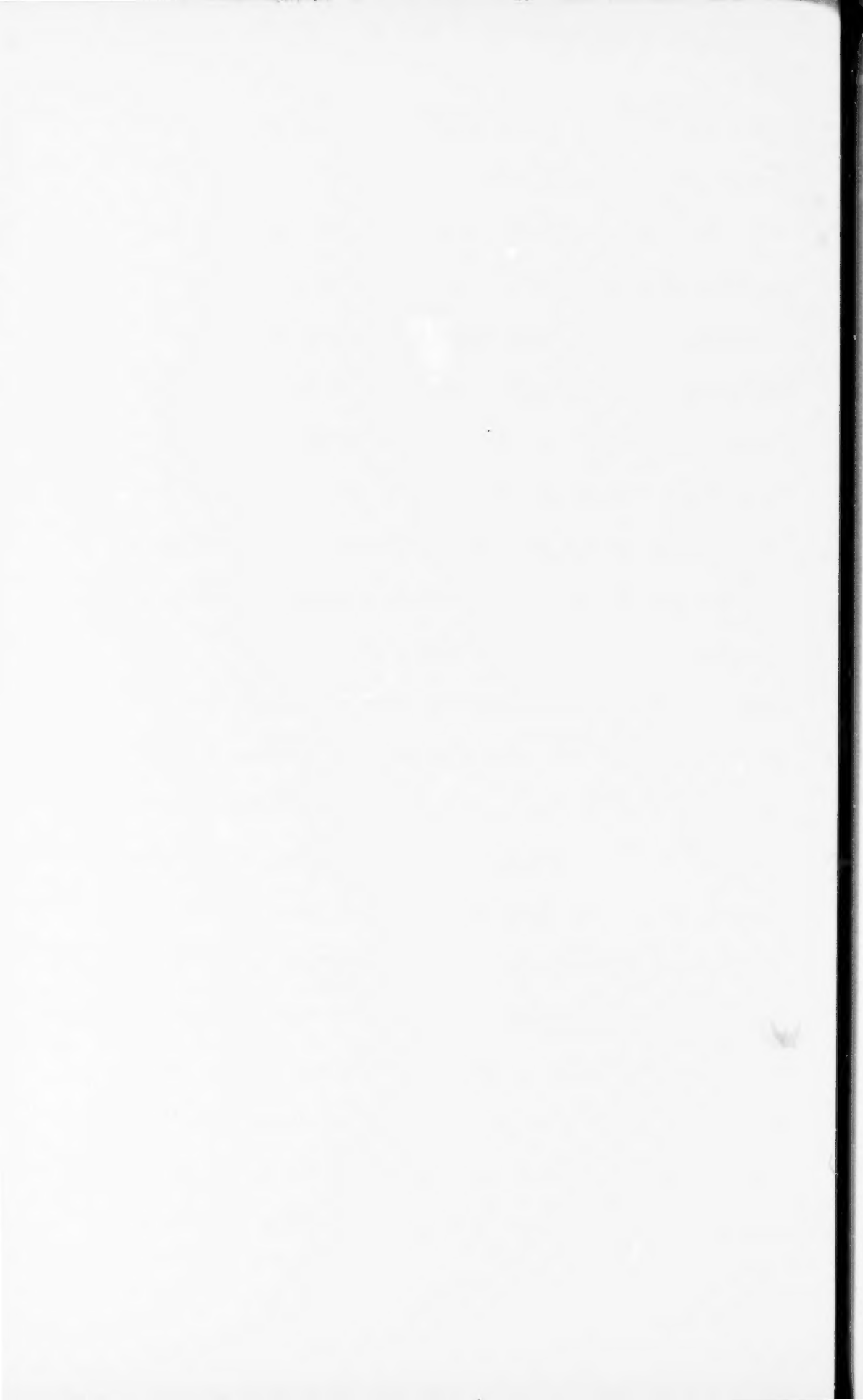
The Bureau of Land Management duly recorded a notice that the two mining claims had been adjudicated null and void. The recordation was made in the official records of the Clark County Recorder on February 26, 1973.

The plaintiff purchased the claims from Mr. Sullivan on March 7, 1979. By affidavit, he represents that he took an option on the two claims from Mr. Sullivan, who said that he owned them. Then, the plaintiff declares in his affidavit, he "went to the County Recorder and searched the record for evidence that Sullivan owned the Charleston claims, and found nothing that would indicate that the claims were not in good standing and then exercised my option and went to producing aggregate therefrom." Further evidence presented to this Court by the Plaintiff establishes that he has made a large investment in operating equipment on the claims and has



been producing vast amounts of sand and gravel materials there.

The Plaintiff has several objections to the Magistrate's report. First, he disagrees with the Magistrate's holding that he is limited, in this U.S. District Court action, to the issue raised before the IBLA; namely, the lack of due process resulting from Mr. Sullivan's not having a lawyer represent him before Hearing Officer Ratzman. He further objects to the Magistrate's conclusion that issues as to the validity of the claims had been waived by Sullivan's failure to raise them in his appeal to the IBLA. In addition, he takes issue with the Magistrate's conclusion that the administrative record reflects no evidence of any sales of or ability to sell sand and gravel from the claims prior to Mr. Sullivan's acquisition of them in 1959. The plaintiff objects in toto to Magistrate Atkins' recommendation to this



Court. She recommends that the plaintiff's motion to set aside agency action be denied, and that defendant United States' motion to dismiss the action be granted.

Discussion:

This Court essentially is reviewing the IBLA's affirmation of the Hearing Officer's decision adverse to the plaintiff. The scope of this review is quite limited. It consists of an examination to determine whether the agency action was arbitrary, capricious, an abuse of discretion, unsupported by substantial evidence, or not in accordance with the law.

Melluzzo v. Watt, 674 F.2d 819, 820 (9th Cir. 1982). In doing so, this Court does not reweigh the evidence or substitute its judgment for that of the administrative agency, Rawls v. United States, 566 F.2d 1373, 1376 (9th Cir. 1978); Baker v. United States, 613 F.2d 224, 226 (9th Cir. 1980).



Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support the agency's conclusion. United States v. Smith Christian Min. Enterprises, 537 F.Supp. 57, 62 (D.Ore. 1981). It is something less than the weight of the evidence; the possibility of reaching an opposite conclusion from the evidence does not prevent the administrative agency's holding from being supported by substantial evidence. Ibid. The record as a whole is looked at, Multiple Use, Inc. v. Morton, 504 F.2d 448, 452 (9th Cir. 1974), rather than merely the evidence that supports the agency decision. Charleston Stone Products Co., Inc. v. Andrus, 553, F.2d 1209, 1213 (9th Cir. 1977), rev'd on oth. gds. 436 U.S. 604 (1978). The claimant had to produce credible evidence, for the agency was not required to give any weight to testimony or other evidence which it did not believe. Osborne v. Hammit, 377 F.Supp. 977, 985 (D.Nev. 1964).



The testimony of the Government's expert, Mr. Schessler, constituted sufficient substantial evidence to constitute a prima facie case. He testified that he had examined the claims and the sand and gravel there could not have been mined and marketed at a profit on or before July 23, 1955. His testimony was not contradicted by evidence that substantial amounts of the materials had been mined or marketed prior thereto. See McCall v. Andrus, 628 F.2d 1185, 1189 (9th Cir. 1980); see also Russell v. Peterson, 498 F.Supp. 8, 9-10 (D.Ore. 1980).

If supported by substantial evidence in the record, the agency's findings of fact are conclusive. Converse v. Udall, 399 F.2d 616, n.1 (9th Cir. 1968). Therefore, judicial review is not procedurally a trial de novo. Doria Min. & Engineering Corp. v. Morton, 608 F.2d 1255, n.5 (9th Cir. 1979). Judicial review is confined to

the agency record, and it is not appropriate for the reviewing court to consider new evidence. United States v. Smith Christian Min. Enterprises, 537 F.Supp. 57, 63 (D.Ore. 1981). An exception is recognized when the party seeking review alleges that he has discovered new evidence showing that the administrative decision was obtained by fraud. Doria Min. & Engineering Corp. v. Morton, supra at 1258. No such allegation has been made here.

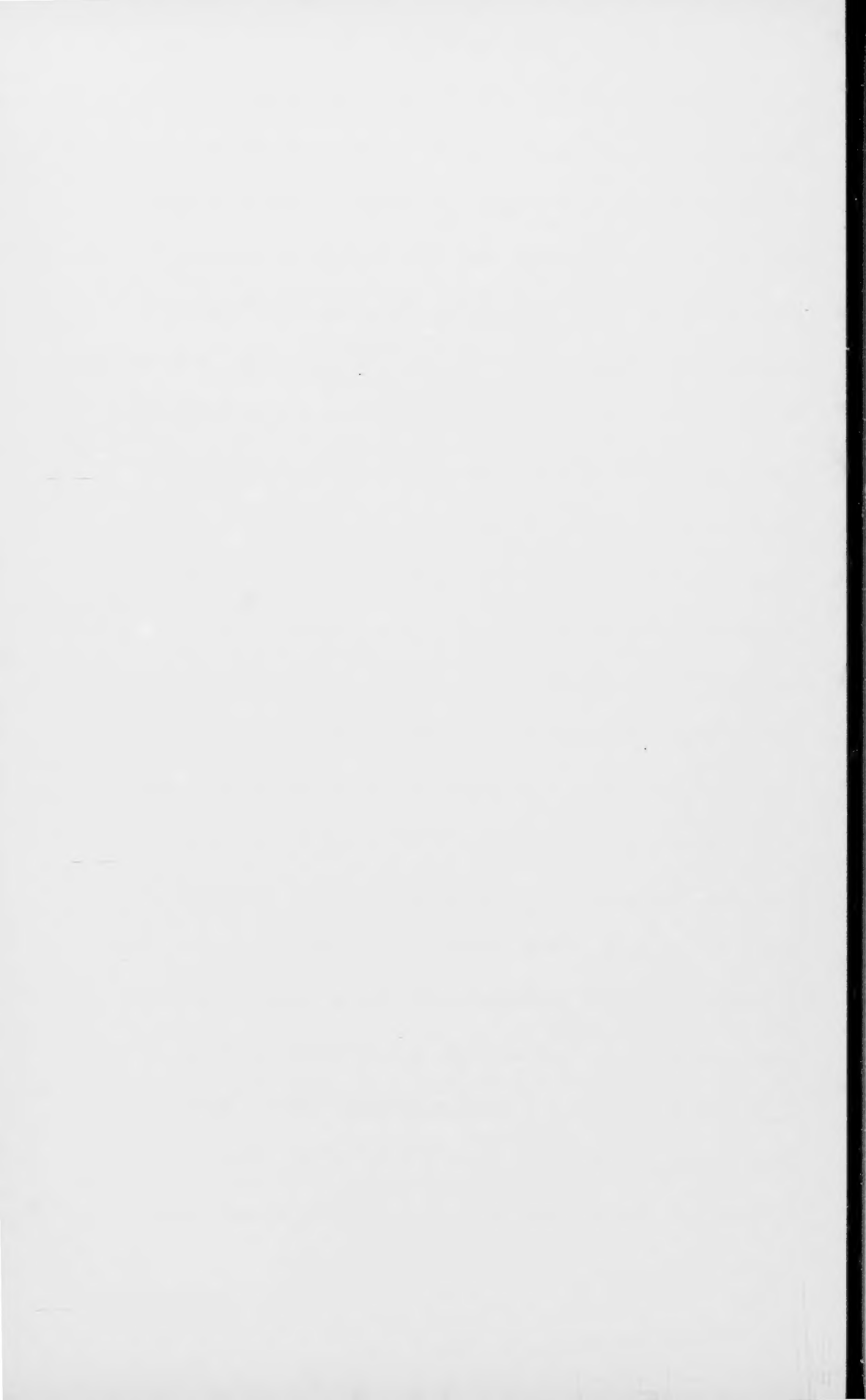
Absent exceptional circumstances, a reviewing court will refuse to consider contentions not presented before the administrative proceeding at the appropriate time. Getty Oil Co. v. Andrus, 607 F.2d 253, 256 (9th Cir. 1979). It is for the agency, not the courts, to determine whether the administrative record should be reopened to consider new facts, unless the failure to reconsider can be characterized an abuse of discretion. Nance v.



Environmental Protection Agency, 645 F.2d 701, 717 (9th Cir. 1981). Since the IBLA refused attorney Hayes' request that the record be reopened to allow the introduction of further evidence, this Court allowed additional exhibits to be submitted in order to help determine whether the IBLA's refusal was an abuse of discretion. Although a statistical exhibit does indicate a significant growth in demand for sand and gravel in the Las Vegas Valley tonnagewise as early as 1955, the same exhibit shows no increase in average price per ton until 1958. The inference is that existing sources of supply easily accomodated the larger demand in 1955. Even if the new evidence had been considered by the Hearing Officer or the IBLA, it would not have been manifestly unjust for the agency to have declared the claims null and void for failure of the claimant to show marketability with a reasonable expectation of profit.

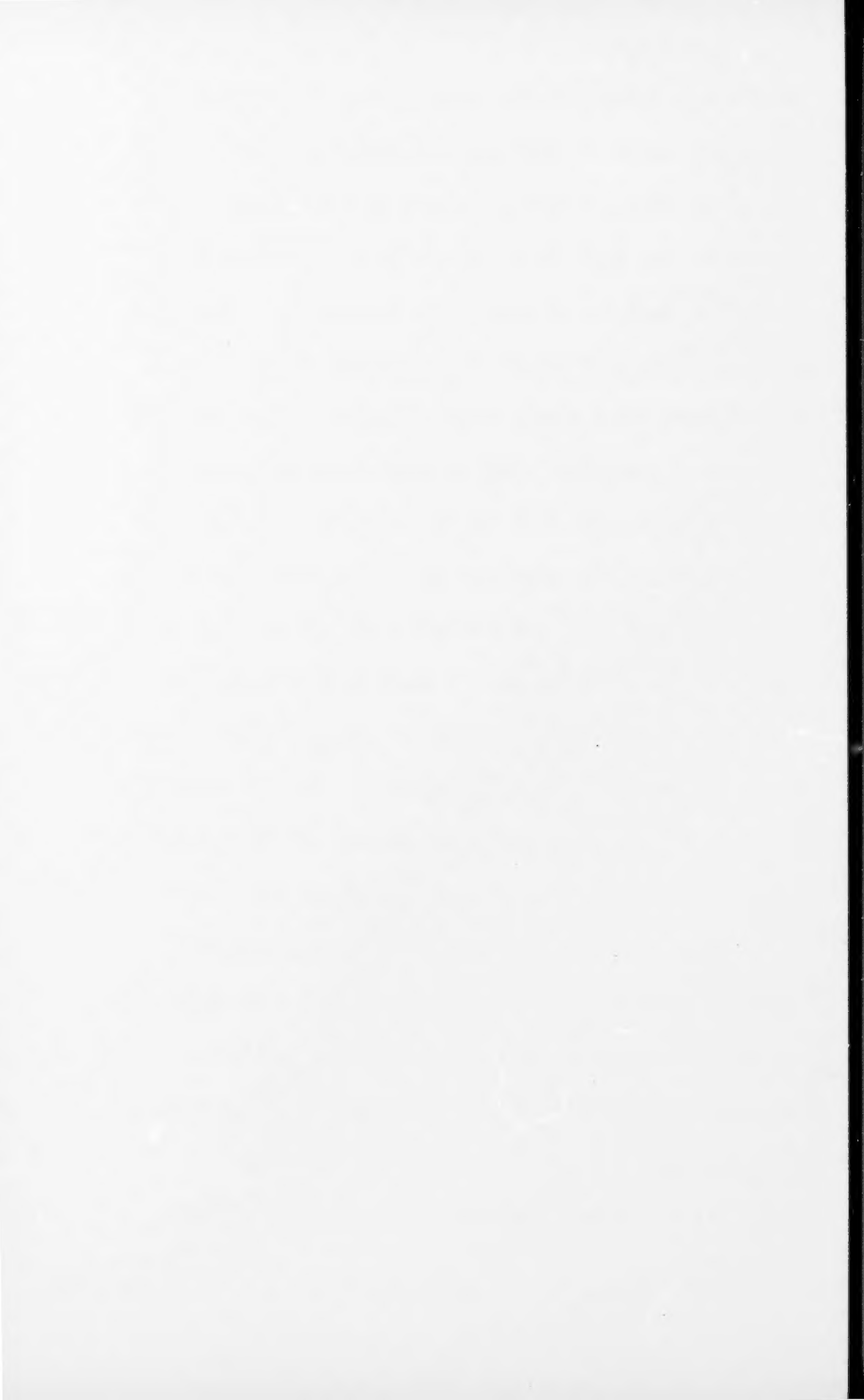


The trier of fact has not abused its discretion unless there is a definite and firm conviction that it committed a clear error of judgement in the conclusion it reached upon a weighing of the relevant factors. Anderson v. Air West, Inc., 542 F.2d 522, 524 (9th Cir. 1976). At least two factors are present here that prevent such conviction from arising. First, the agency originally balked at allowing Mr. McNutt to represent Mr. Sullivan. It required a deliberate ratification by Sullivan of McNutt's representation before the latter was allowed to practice before the Hearing Officer. The right to counsel can be waived. United States v. Weiner, 578 F.2d 757, 774 (9th Cir. 1978). The due process right to counsel in a civil action ordinarily requires no more than a right to retain counsel if one so desires. See Goldberg v. Kelly, 397 U.S. 254, 270 (1970). In a review of a Securities and

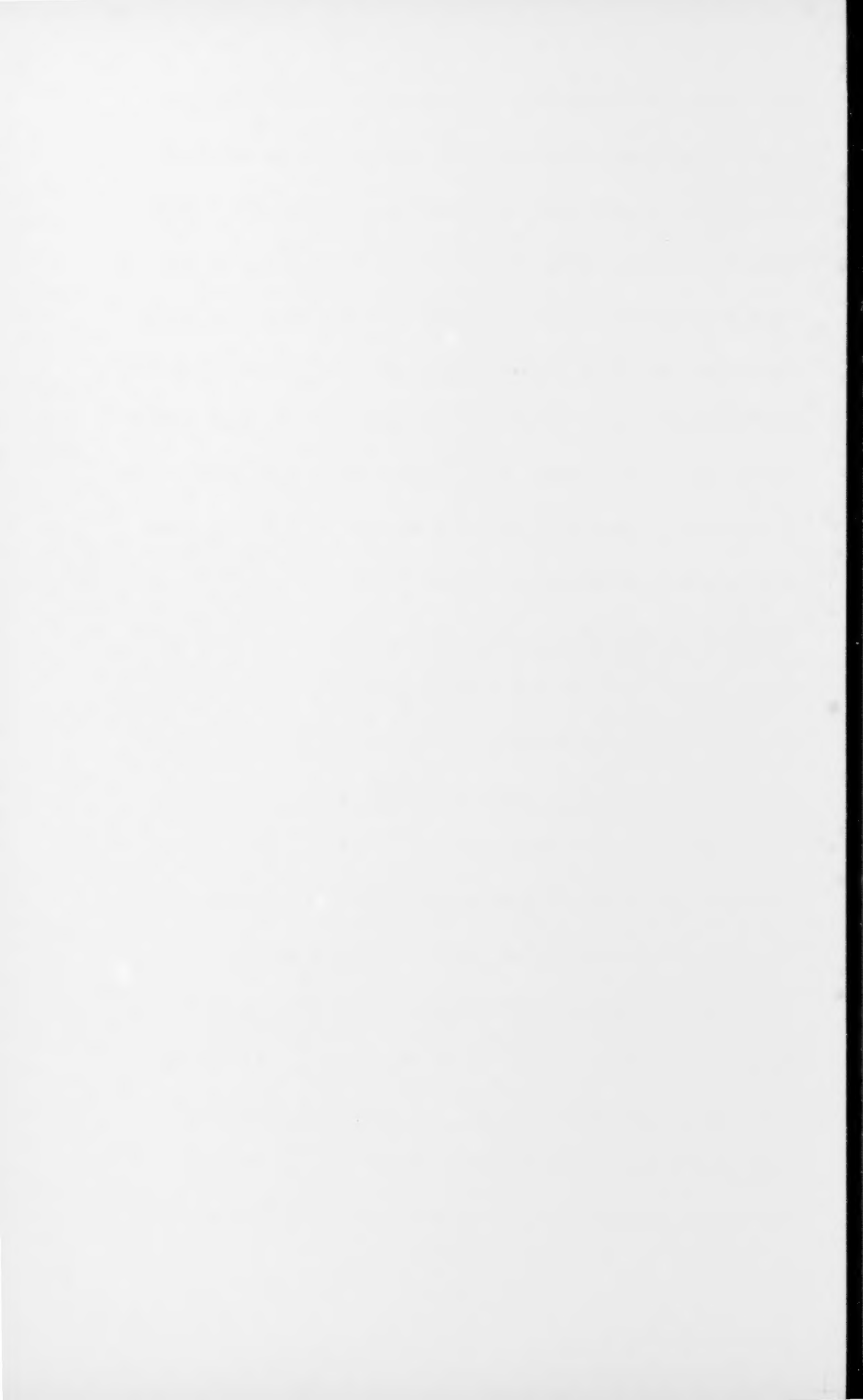


Exchange Commission decision, the Ninth Circuit denied the petitioner's contention that he should be granted a new hearing because he had failed to avail himself of counsel before a hearing examiner. Nees v. Securities and Exchange Commission, 414 F.2d 211, 221 (9th cir. 1969). The petitioner's request for a new hearing was denied because (1) he had been afforded an opportunity to employ counsel for the hearing, (2) no one deprived him of that right, and (3) the Government was not obligated to provide him with counsel. Ibid. The same may be said of Mr. Sullivan. Since the plaintiff stands in the shoes of Sullivan, the identical reasoning applies to him.

The second factor which militates against this Court holding that the administrative agency abused its discretion concerns the plaintiff directly, and not as the successor in interest of Mr. Sullivan. That factor is the effect of



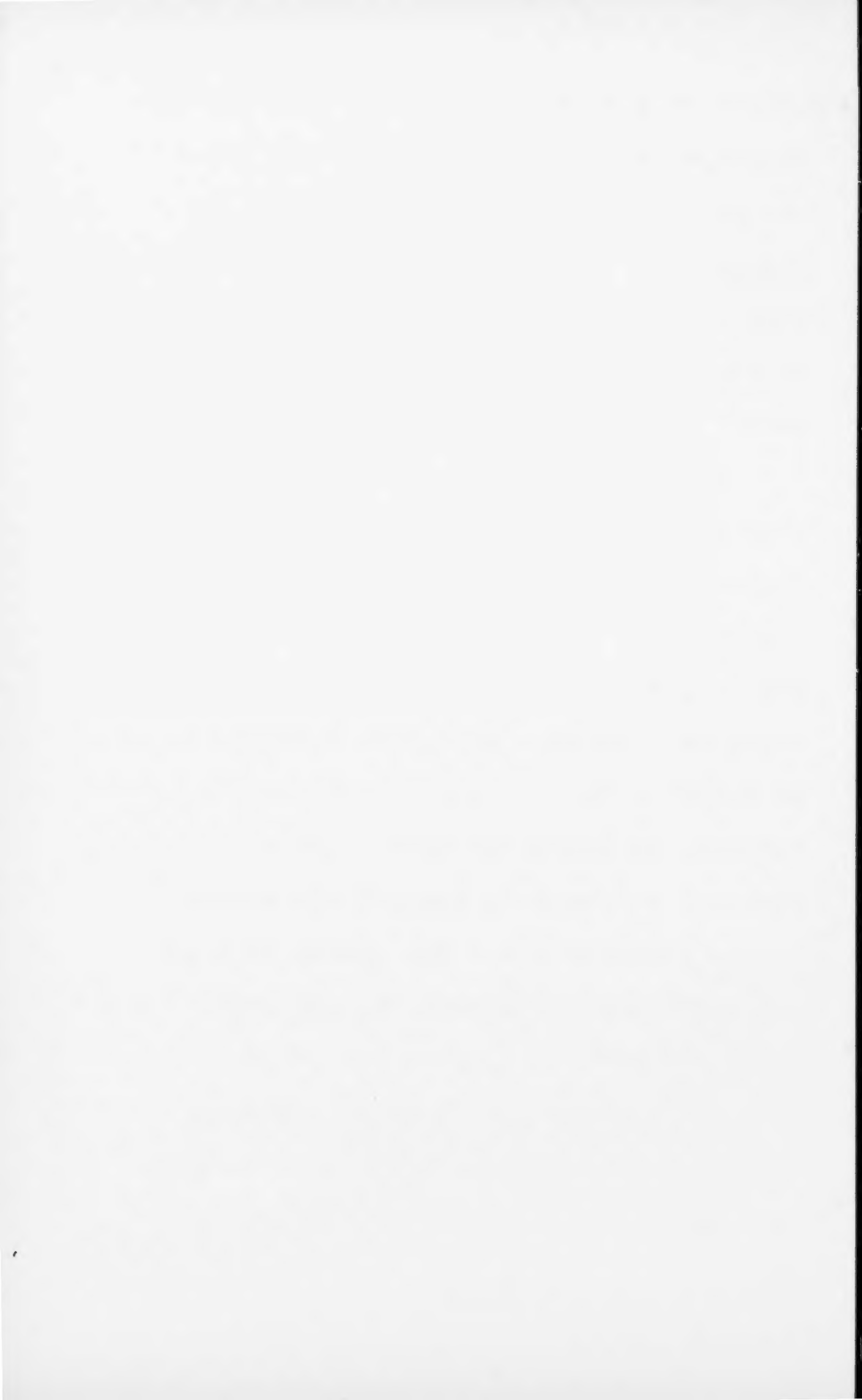
Nevada's recording statutes. The notice that the two claims had been adjudicated null and void was properly recorded. See NRS 247.120, NRS 517.110. From the time of its recordation it imparted notice to all persons of its contents, so that subsequent purchasers are deemed to purchase and take with notice. NRS 111.320; NRS 247.190. As a result, the plaintiff does not have the status of either a bona fide purchaser, Hewitt v. Glaser Land & Livestock Co., 97 Nev. 207, 626 P.2d 268, 269 (1981), or a good faith purchaser. Allison Steel Manufacturing Co. v. Bentonite, Inc., 86 Nev. 494, 471 P. 2d 666, 669 (1970). He is deemed to have knowledge of the contents of the recorded notice and is not permitted to disclaim that knowledge. See White v. Moore, 84 Nev. 708, 448 P.2d 35, 36 (1968); All Am. Van & Storage v. DeLuca Realty, Inc., 95 Nev. 253, 592 P.2d 951 (1979). It is well established that one who is not a



bona fide purchaser can acquire no greater interest in the property than that which the grantor had to convey. Willis v. Stager, 481 P.2d 78,83 (Or. 1971). At the time the plaintiff purchased Mr. Sullivan's purported mining claims, the latter had no such interest to convey.

The plaintiff's objection to the portion of the Magistrate's report that declares there was no evidence in the transcript of any sales or ability to sell from the claims prior to 1959 is technically well taken. Some such evidence is to be found in the administrative record. However, as discussed above, there is substantial evidence to support the agency action nevertheless. The upshot is that proving his point avails the plaintiff nothing.

The correct standards of law were applied by the Hearing Examiner. The prudent man test and the marketability test



both were applicable. Andrus v. Shell Oil Co., 446 U.S. 657, n.4 (1980); Edwards v. Kleppe, 588 F.2d 671, 672 (9th Cir.

1978). The marketability test is usually the critical factor in cases involving nonmetallic minerals of widespread occurrence. United States v. Coleman, 390 U.S. 599, 603 (1968). In his brief filed subsequent to the February 18, 1971, hearing before hearing Officer Ratzman, Mr.

Sullivan acknowledged that: "Subject to the usual minor differences, the sand and gravel material on the two contested claims is similar to and is useable for the same general construction and building purposes as other sand and gravel deposits in the Las Vegas area." The fact that the Las Vegas Valley is full of sand and gravel has been noted. Foster v. Seaton, 271 F.2d 836, 838 (D.C. Cir. 1959).

The fact that the plaintiff has demonstrated that he has been marketing large



quantities of sand and gravel from the claims doesn't establish that the materials could have been marketed with a reasonable expectation of profit on or before July 23, 1955. The burden of showing such marketability rested on Mr. Sullivan. See Verrue v. United States, 457 F.2d 1202, 1203 (9th Cir. 1972); Multiple Use, Inc. v. Morton, 353 F.Supp. 184, 190, 195 (D.Ariz. 1972), aff'd 504 F.2d 448 (9th Cir. 1974).

As modified and supplemented hereinabove, the Court accepts the Magistrate's report and the findings contained therein. The Court accepts the recommendation of the Magistrate.

IT IS, THEREFORE, HEREBY ORDERED that the plaintiff's motion to set aside agency action be, and the same hereby is DENIED.

IT IS FURTHER ORDERED that the motion to dismiss of defendant United States of America be, and the same hereby is, GRANTED.



DATED: December 30, 1982.

UNITED STATES DISTRICT JUDGE

CHARLESTONE STONE PRODUCTS

CO., INC. a corporation,

Plaintiff-Appellee,

v.

Cecil D. ANDRUS, Secretary of the
Interior,* and United States of
America, Defendants-Appellants.

No. 75-1532.

United States Court of Appeals,
Ninth Circuit.

May 12, 1977.

Secretary of Interior initiated
contest complaint attacking validity of
placer sand and gravel mining claims filed
in 1942. Only one claim was found to be
valid, and judicial review was sought. The
United States District Court for the
District of Nevada, Bruce R. Thompson, J.,
held that 15 other claims were valid and

*Rogers C. B. Morton, as Secretary of Interior, was the
originally named Secretary. We note the name of his
present successor in office.



that title holder was entitled to access to another claim in order to utilize water produced from well thereon, and appeal was taken. The Court of Appeals, East, Senior District Judge, held that: (1) Board of Land Appeals improperly credited mining engineer's unfounded opinion of nonvalidity; (2) seemingly sporadic operations which were a mirror of building and construction industry in the area during and shortly after World War II did not preclude a finding of validity; and (3) title holder was entitled to access to a 17th claim in order to utilize water recovered from well thereon in operation of other valid claims.

Affirmed.

1. Mines and Minerals 40

In determining validity of placer sand and gravel mining claims filed in 1942 the Board of Land Appeals improperly credited mining engineer's opinion of nonvalidity



where there was no indication that he was familiar with the area during the crucial period and his opinion was not based on personal knowledge of the relevant market and, more importantly, his opinion was flatly contradicted by prior report based on investigation completed within one year of the crucial period and also by direct evidence of marketability supplied by persons who actually witnessed substantial recoveries from the claims. 30 U.S.C.A. §611.

2. Mines and Minerals 17(1)

Marketability of pre-July 23, 1955 extraction from placer sand and gravel mining claims could be tested by factors of accessibility, bona fides of the operators in developing the claims, existence of market demand within reasonable proximity to the claims and actual participation in the market. 30 U.S.C.A. §611.



3. Mines and Minerals 23(1)

Continuous operation of a placer mining claim is not a prerequisite to proving validity of that claim; reason dictates that periodic cessation of operation, short of intentional abandonment, need not defeat ultimate proof of validity; since a total absence of operation does not preclude a finding of validity, it follows tht sporadic operation does not preclude a finding of validity.

30 U.S.C.A. §611.

4. Mines and Minerals 23(1)

The prudent person test for determining validity of a placer mining claim has enough flexibility to allow a sand and gravel business operator to undertake an apparently marginal enterprise if it has a reasonable probability of success; placer sand and gravel mining claims, which were filed in 1942, were not invalid merely because of seemingly



sporadic operations where such operations were a mirror of the building and construction industry in the area during and shortly after World War II. 30 U.S.C.A. §611.

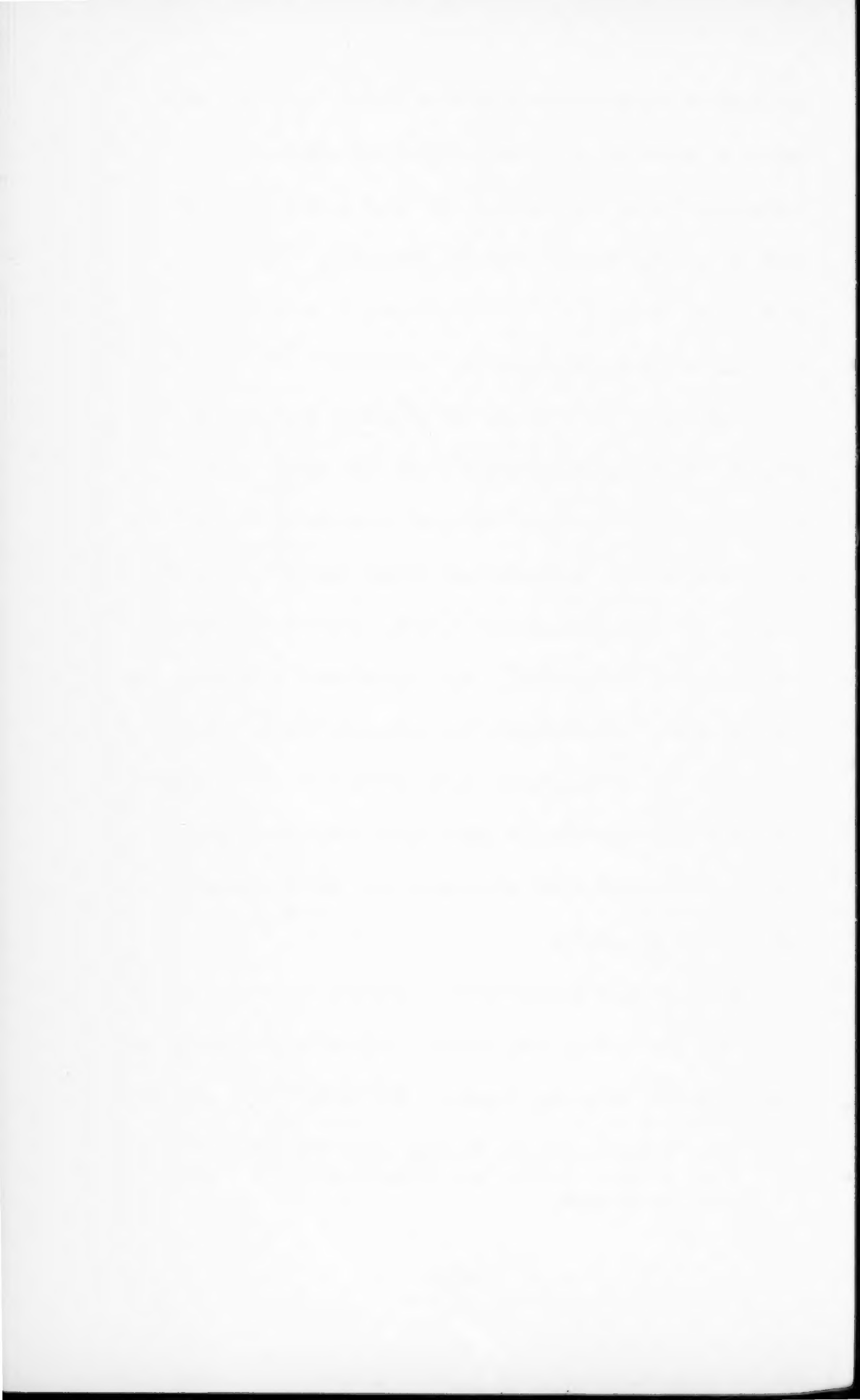
5. Mines and Minerals 29(3)

Holder of title to placer sand and gravel mining claims filed in 1942 was entitled to access to one claim in order to utilize water recovered from well on such claim in operation of other valid claims; record title holder, as original claimant's successor, had right to appropriate and utilize as a mineral the water within any of the claims which met the two-pronged test of value and success in development. 30 U.S.C.A. §611.

6. Mines and Minerals 29(3)

Water is a "mineral" within meaning of the placer mining laws. 30 U.S.C.A. §611.

See publication Words and Phrases for other judicial constructions and definitions.



7. Mines and Minerals 17(1)

Although critical date for determining validity of placer sand and gravel mining claims was July 23, 1955, date after which common variety sand and gravel deposits were no longer locatable, it was of no importance that discovery of water on one claim, which water was sought to be used to wash sand and gravel mined from other claims, occurred after July 23, 1955. 30 U.S.C.A. §611.

Appeal from the United States District Court For the District of Nevada.

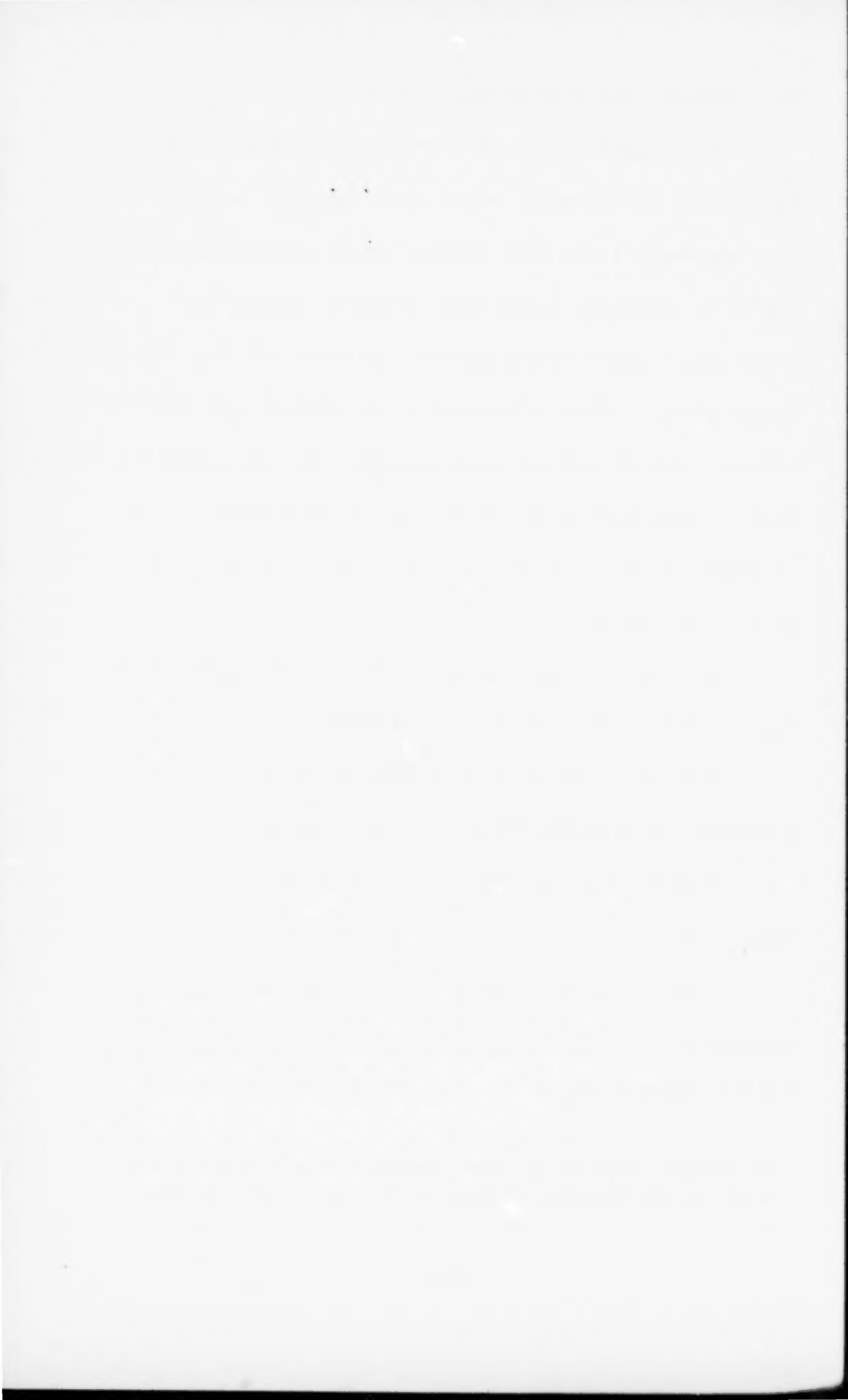
Before TRASK and GOODWIN, Circuit Judges, and EAST,** District Judge.

EAST, Senior District Judge:

The Cause:

Cecil D. Andrus, for the defendants-appellants, as Secretary of Interior, (Secretary) appeals the judgment of the

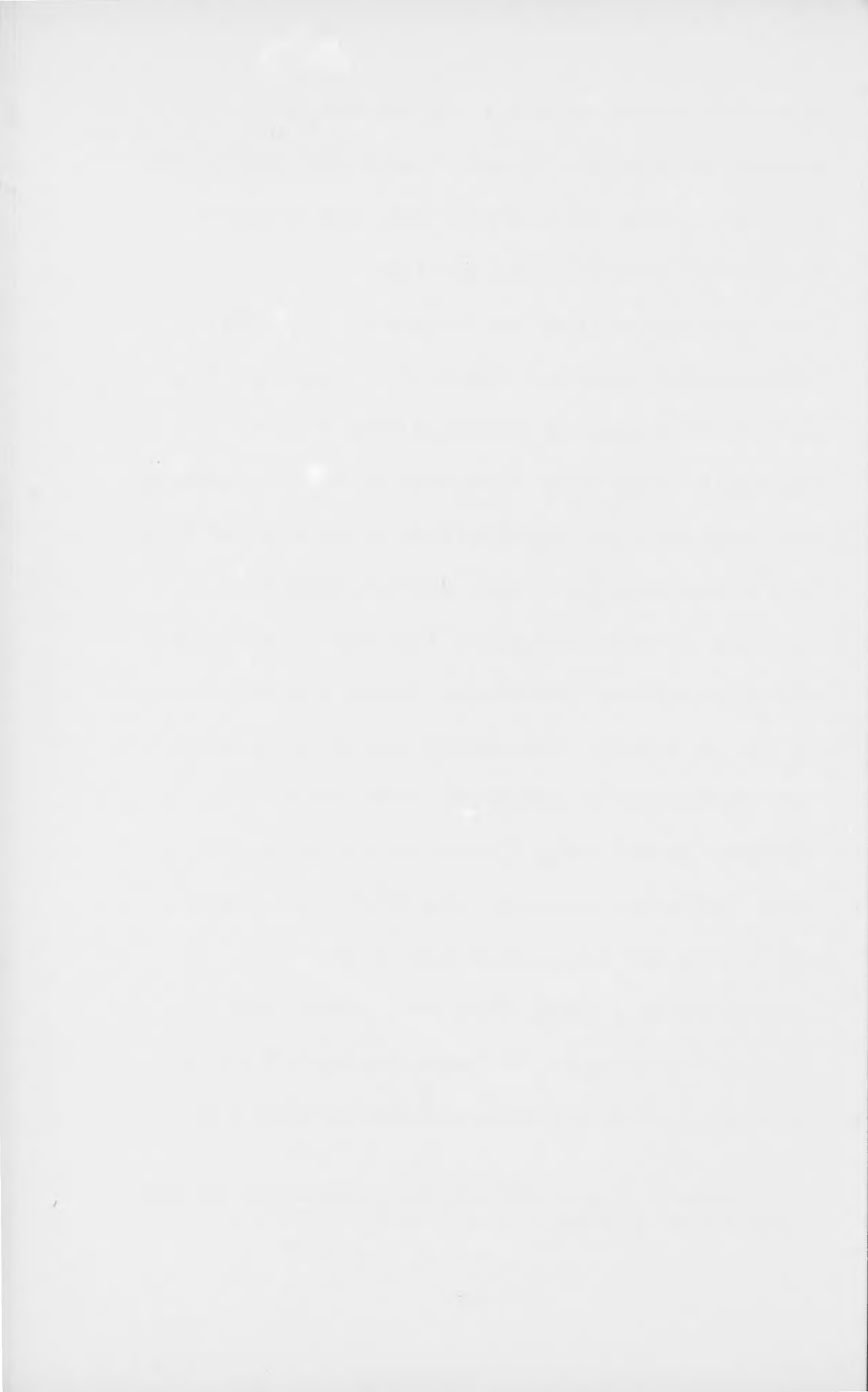
**Honorable William G. East, Senior United States District Judge for the District of Oregon, sitting by designation.



District Court holding valid and granting access to certain placer sand and gravel mining claims located in the Las Vegas Valley in Nevada. We affirm.

The Secretary on November 17, 1965 initiated a contest complaint against the plaintiff-appellee Charlestone Stone Products Co., Inc. (Charlestone), attacking the validity of Charlestone's placer mining locations for sand and gravel numbered 1 through 22 and numbered 12A and 13A.¹ The Administrative Law Judge found Claims 9 and 10 to be valid. On cross-appeals, however, the Secretary's Board of Land Appeals (Board) found only Claim 10 to be valid. Upon judicial review, the District Court, believing an injustice had been accomplished, held that "at least the claims 1 through 16" were valid. It also held that Charlestone should be granted

1. Claims numbered 12A and 13A located after the year 1955 are not an issue.



access to Claim 22 in order to utilize, in the operations of the valid claims, the water produced from a well driven on Claim 22.

Issues on Review:

While the Secretary asserts the issues on review in different terms, we deem the pertinent issues to be:

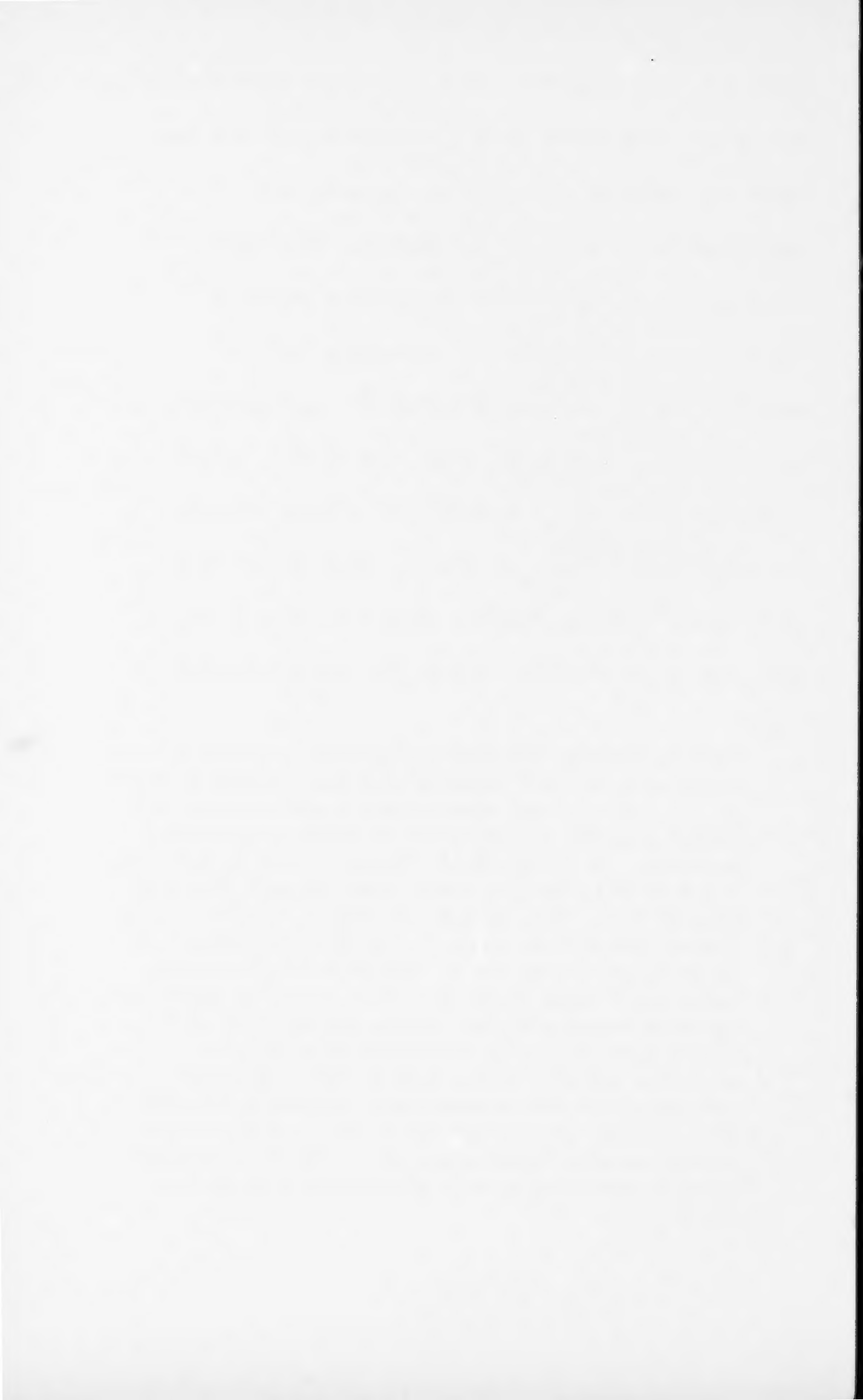
(1) Whether, upon construing the record as a whole, the Secretary's finding that only Claim 10 was valid is supported by substantial evidence. *Multiple Use, Inc. v. Morton*, 504 F.2d 448, 452 (9th Cir. 1974); *White v. Udall*, 404 F.2d 334, 335 (9th Cir. 1968); and *Henrikson v. Udall*, 350 F.2d 949, 950 (9th Cir. 1965), cert. denied, 384 U.S. 940, 86 S.Ct. 1457, 16 L.Ed.2d 1538 (1966).

(2) Whether Charlestone met the two prong test of establishing: (a) A discovery of a valuable deposit of sand and gravel on



each of its claims; and (b) The intrinsic value of the sand and gravel deposits was such as "would justify a person of reasonable prudence in making further expenditures upon the property with a reasonable prospect of success in developing a valuable mine."² United States v. Coleman, 390 U.S. 599, 88 S.Ct. 1327, 20 L.Ed.2d 170 . . . (1968)." Clear Gravel Enterprises, Inc. v. Keil, 505 F.2d 180 (9th Cir. 1974), cert. denied, 421 U.S. 930, 95 S.Ct. 1657, 44 L.Ed.2d 87 (1975);

2. That is, whether the sand and gravel "in question could be extracted, removed and marketed at a profit on . . . July 23, 1955 when common variety sand and gravel deposits as here involved became no longer locatable. 30 U.S.C. §611. United States v. Barrows, 401 F.2d 749 (9th Cir., 1968), cert. denied, 394 U.S. 974, 89 S.Ct. 1468, 22 L.Ed.2d 754 . . . (1969)." Clear Gravel Enterprises, supra at 180-81. Section 611, in its pertinent parts, reads: "No deposit of common varieties of sand, stone, gravel . . . shall be deemed a valuable mineral deposit within the meaning of the mining laws of the United States so as to give effective validity to any mining claim hereafter located under such mining laws: Provided, however, That nothing herein shall affect the validity of any mining location based upon discovery of some other mineral occurring in or in association with such a deposit."

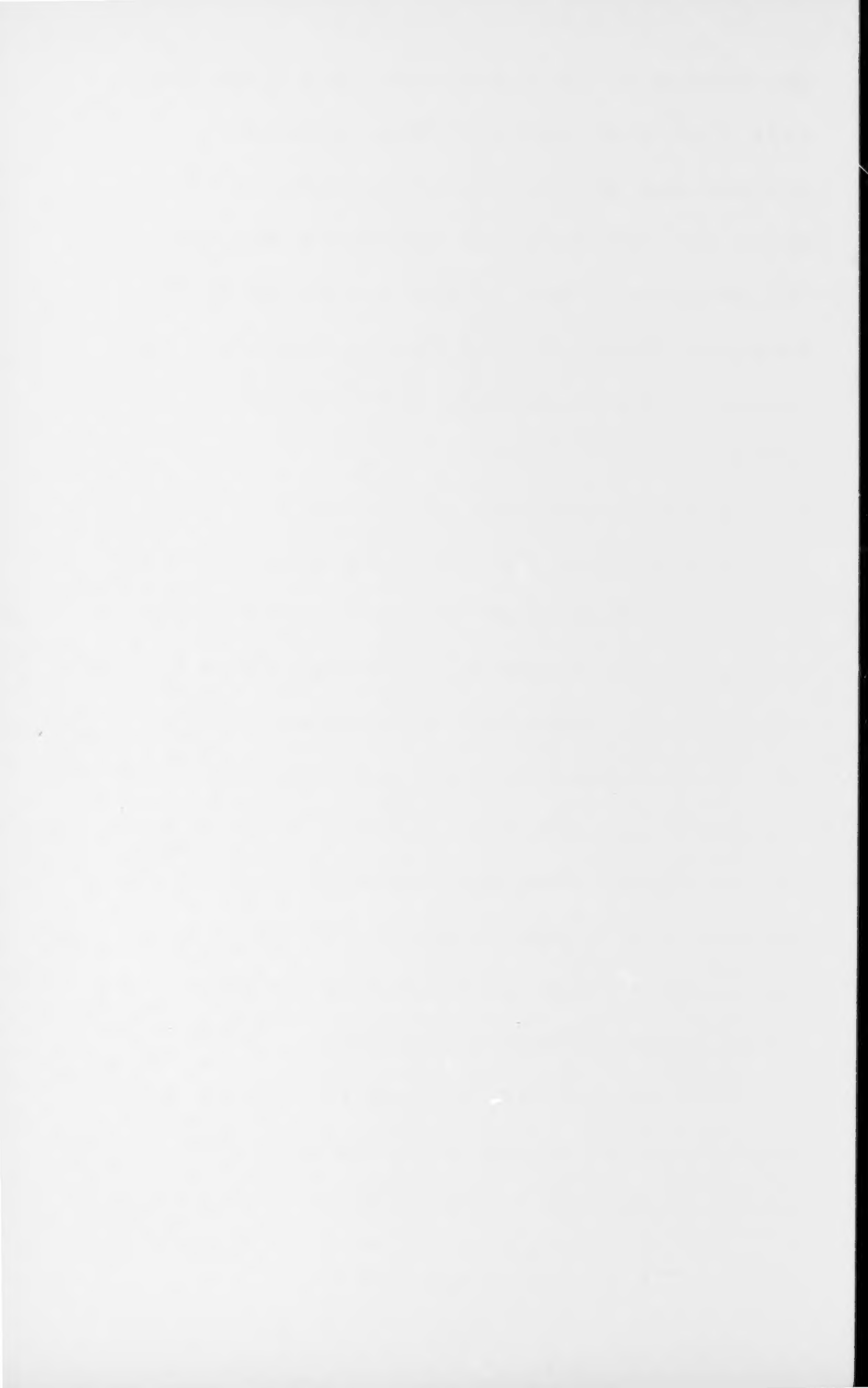


and Verrue v. United States, 457 F.2d 1202, 1203 (9th Cir. 1972). "The reasonably prudent man we are concerned with is the miner who has made his discovery and not the prospector who is still looking." Humboldt Placer Mining Co. v. Secretary of Interior, 549 F.2d 622, 624 (9th Cir. 1977).

Filing and operations of Claims:

Pursuant to the existing statute, A.M. Murphy and Fred Pine (Murphy) filed placer mining claims numbered 1 through 22 on February 18, 1942 in a surface water wash of the Las Vegas Valley some 15 miles distant from the then center of the city of Las Vegas. The aggregate acreage of the several claims approximated 450 acres and contained a later estimated 20 million cubic yards of sand and gravel.

The evidentiary record is replete with eyewitness testimony that the sand and gravel contained in the area of the claims



was of excellent quality for various construction uses and had value as such.

Shortly after the location and filing of the claims, Murphy's assignee, Southern Nevada Industries, Inc. (Southern), began operation within the confines of the claims and removed some 100,000 yards of material from a number of places up and down the wash. Due to the absence of washing water, Southern transported the raw materials to a site some five miles distant for crushing, screening, and washing. The refined material was used in the construction of an air force base situated northeast of Las Vegas. Southern closed the operation in 1943 and moved to an area near Henderson, Nevada for participation in a World War II construction project in that area. Thereafter, during the remainder of World War II and its aftermath, private construction in the area was curtailed.



From September, 1954 until during the year 1957, one E. H. Brawner (Brawner), as lessee of the claims, operated under a royalty agreement of not less than \$200 per month. It is undisputed that at this time Brawner's sand and gravel operation was farther from Las Vegas than were the operations of his competitors. Brawner's operation was also hampered to some extent by the absence of a water supply. Nevertheless he continued to operate the crushing plant within the limits of Claim 10 and materials were extracted from the crusher area and "pit" located within that claim and from other claims in the canyon. The market demand for the various types of sand and gravel, together with the lay of the various materials, dictated the location of the extractions. Brawner made profitable sales of the extracted materials through the year 1957.

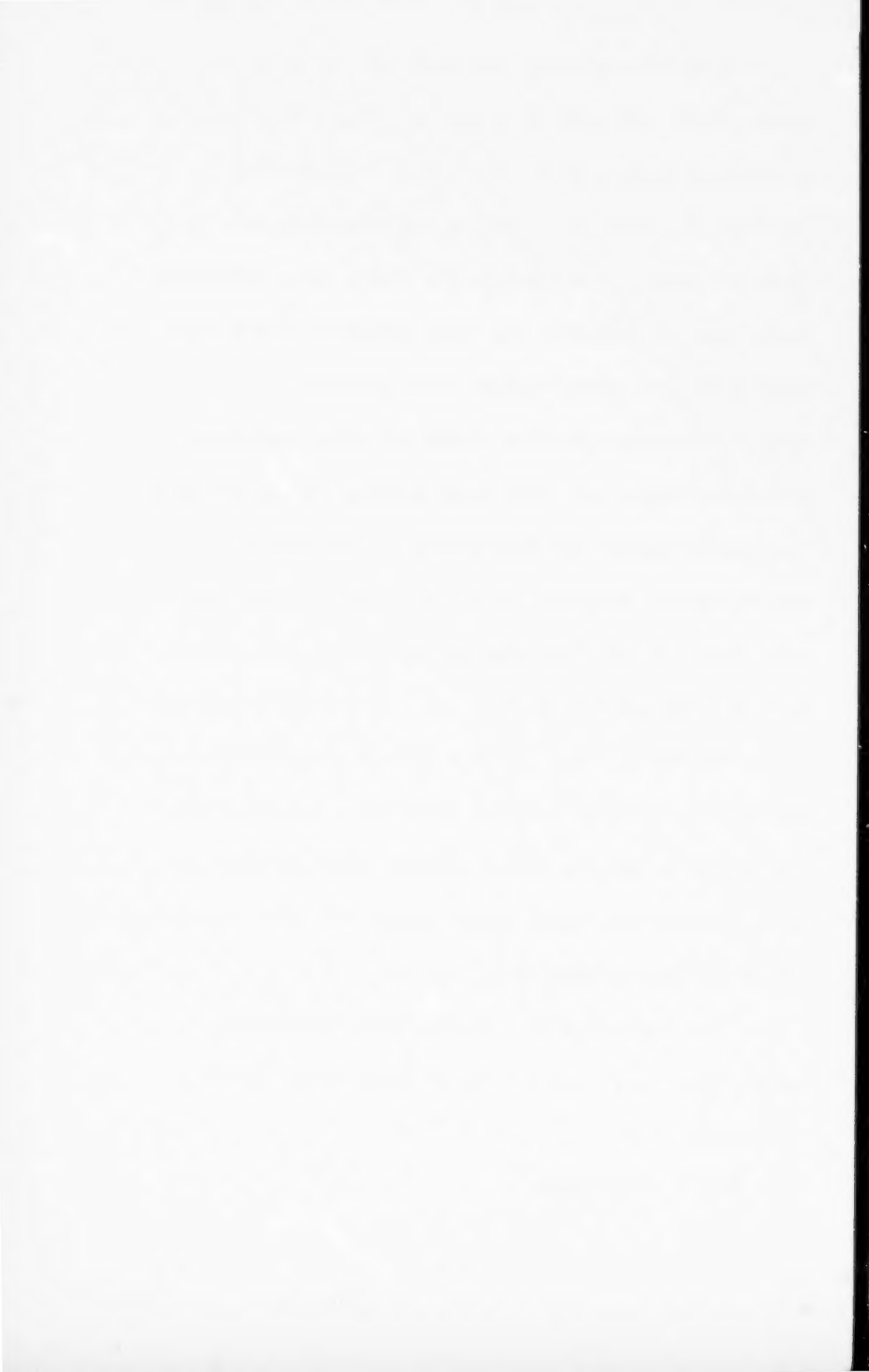


The foregoing narration carries the operation on the claims through the critical pre-July 23, 1955 discovery period.³ The following narration of operations subsequent to July 23, 1955 is pertinent, first, to the extent that the facts might bear upon the proper application, at the time of the contest proceedings, of the two prong "value" and "prudent man" or marketability test enunciated above; and, secondly, to the continuity of the marketability of the extracted materials.

On April 9, 1959, Frank R. Sullivan obtained title to the claims, extracted materials which were later stockpiled on the property, and sold some of the material as roofing granules.

On January 5, 1960, Charlestone acquired title to the claims and during

3. See note 2, supra.



1961 Morrison-Knudsen, Inc., as lessee, entered the claims, constructed a screening plant within the confines of Claim 10 and carried on processing operations.

Unsuccessful efforts were made to drill screening water wells within Claims 9 and 10, and in 1962, at the cost of some \$3,000, a well supplying adequate washing water was located within Claim 22. On July 15, 1964, Charlestone leased Claims 1 through 16 to Arden Sand and Gravel Co. (Arden) for a period of five years with an annual royalty of \$12,000. Although Charlestone retained Claims 17 through 22, it agreed to furnish Arden with electrical power and washing water from the well within Claim 22.

Action of the Secretary:

During the summer of 1956 while the Brawner operations were in progress, the United States Bureau of Land Management in Nevada employed Messrs. Hill and Lovejoy

(Hill), competent engineers and surveyors, to investigate the validity of the instant claims. Hill reported that Claims 1 through 22 encompassed a valuable discovery of sand and gravel deposits and were valid. The report constituted a comprehensive and informative discussion of the factors bearing upon a determination of marketability of sand and gravel deposits and of the quality of particular sand and gravel deposits as of July 23, 1955. After submission of the Hill report, the Bureau of Land Management affirmed the validity of the Brawner claims and removed the area of the claims from an open small tract classification.

Nine years later the Secretary employed Donald G. Fisher (Fisher)⁴, a mining engineer, to investigate and report

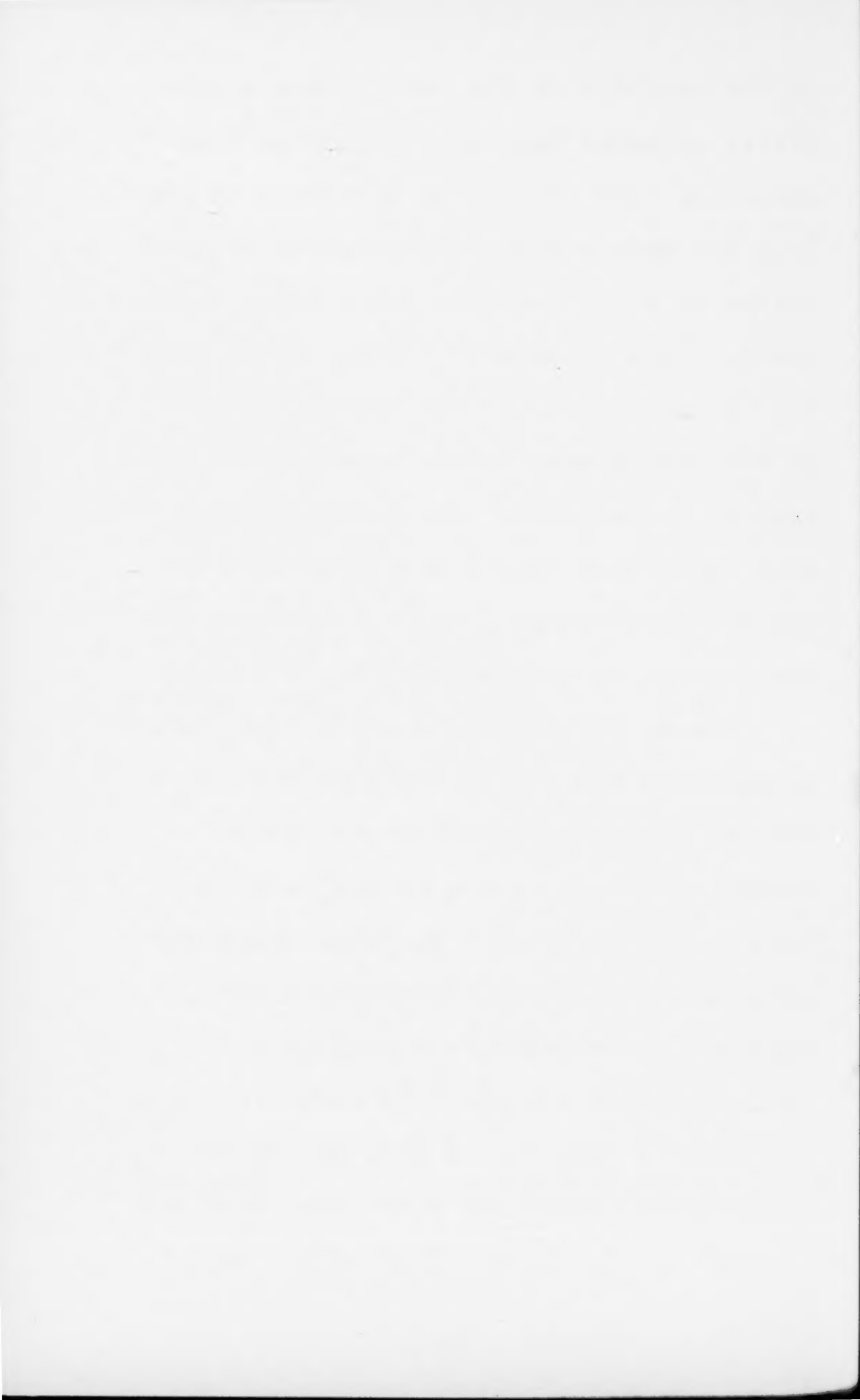
4. Fisher had been previously employed by the Secretary in connection with other contests of sand and gravel claims within the Las Vegas vicinity.



on the validity of the Charlestone claims. Fisher gathered hearsay information from competing sand and gravel operators in the area and made a visual examination of the claims in 1965, some ten years after the crucial date of July 23, 1955. Based upon his investigation, Fisher opined that all of the Charlestone claims were invalid for want of a discovery. The Secretary then used the Fisher report as a basis for the contest proceedings.

Administrative Proceedings:

Fisher was the Secretary's sole witness and his testimony comprised the only evidence in support of the contest. Fisher testified to the effect that his opinion was based upon information gained as a result of visual examination of apparent extractions from each of the claims in 1965 and again in 1969; review of all mineral reports, as well as the Hill report; and interviews with local sand and



gravel dealers, including the present owners and the past operators of the claims. Further, he testified that his opinion was also based upon his familiarity with the Las Vegas area, where he had previously been employed by the Government in making validity determinations and market studies in mining contest cases. Fisher, using his version of the test of discovery, opined that "this was a very sporadic operation . . . [It] didn't appear to be an operation that could sustain a continuous operation over the years" and the claims were invalid for want of discovery. In his opinion, the crucial factors in the invalidity of the claims were the excessive distance of the claims from a market and the lack of washing facilities.

To rebut Fisher's testimony, Charlestone produced the deposition testimony of Hill. Hill's testimony

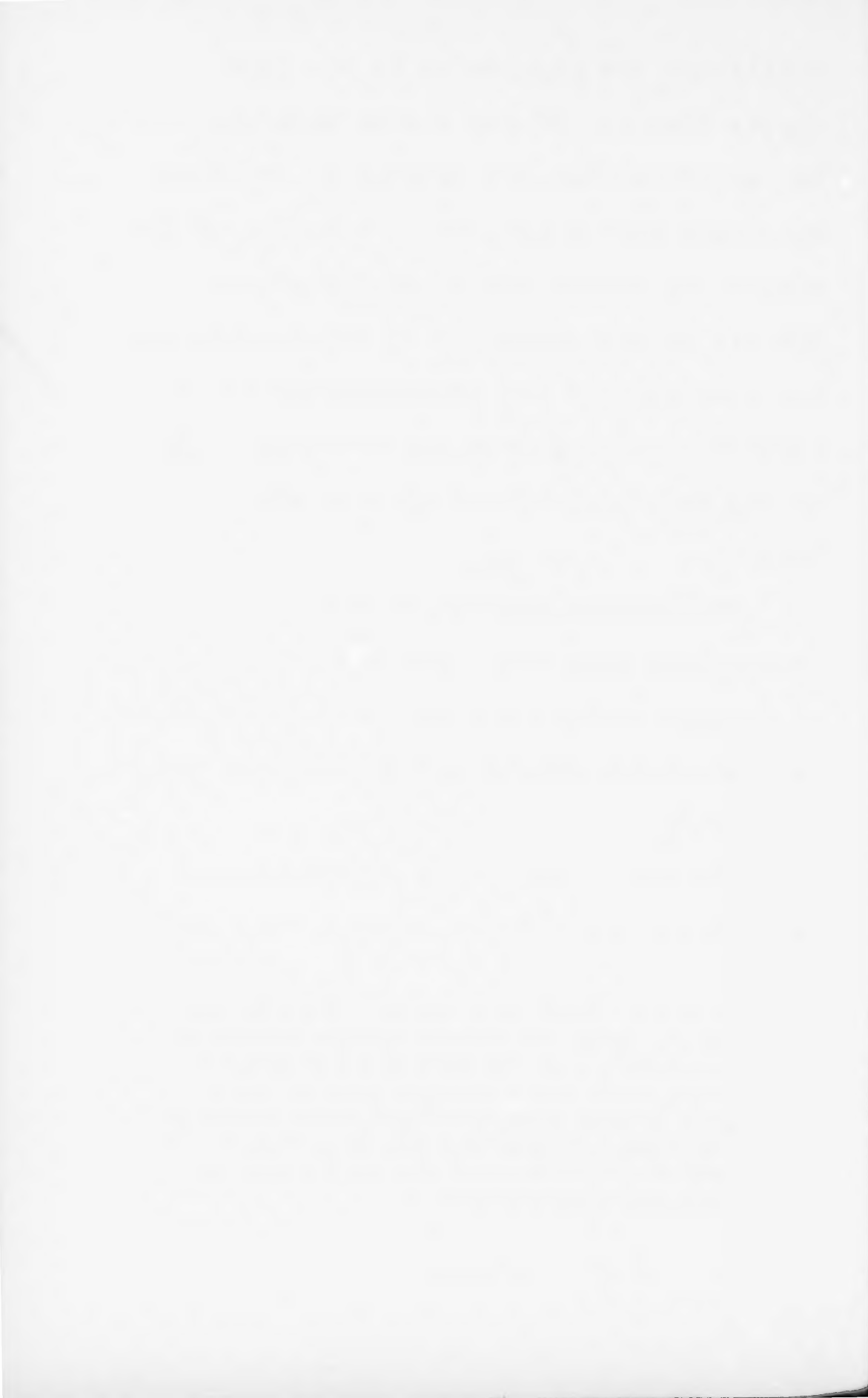


reaffirmed the conclusion in his 1956 report that all of the claims were valid. He testified that his opinion of validity was based upon a personal inspection of the claims, an investigation of the actual history of the operation of the claims, and his knowledge of the marketability of the product resulting from the thorough study he had made in conjunction with Mr. Lovejoy.

Charlestone buttressed Hill's conclusions with the eyewitness testimony of several workers who had been employed at the extraction operations by Southern and Brawner.⁵

The decisions of the Administrative Law Judge and the Board reflect that each

5. The record establishes actual sales from the claim sites and constitutes an even stronger showing of marketability than was made in either *Melluzzo v. Morton*, 531 F.2d 860 (9th Cir. 1976), or *Virrué*, *supra*. In those cases, this Court, notwithstanding a total absence of sales from the claim sites, reversed decisions of the Secretary that certain sand and gravel claims were invalid.



gave substantial weight to Fisher's testimony. At the conclusion of the hearing, the Administrative Law Judge found only two of the 22 claims to be valid. On administrative review, the Board, placing even more credence on Fisher's opinion, found only one of the claims to be valid. Charlestone ultimately and successfully sought review of the latter decision in the District Court.

Discussion and Disposition:

Issue 1:

[1] We conclude that the Board's exclusion of validity of Charlestone's claims, except as to Claim 10, is not supported by substantial evidence.

Our conclusion is, first, guided by the course set in Walker v. Mathews, 546 F.2d 814, 818 (9th Cir. 1976):

"Substantial evidence means that a finding is supported by 'more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to



support a conclusion." (Richardson v. Perales (1971) 402 U.S. 389, 401, 91 S.Ct. 1420, 28 L.ED.2d 842). In applying the substantial evidence test we are obligated to look at the record as a whole [6] and not merely at the evidence tending to support a finding."

Footnote 6 reads:

"See, Day v. Weinberger (9th Cir. 1975) 522 F.2d 1154, 1156 ('But in determining whether there is substantial evidence to support the examiner's finding a reviewing court must consider both evidence that supports, and evidence that detracts from, the examiner's conclusion. We cannot affirm the examiner's conclusion simply by isolating a specific quantum of supporting evidence'); Davis, 4 Administrative Law Treatise §29.03 (1958) ('. . . Evidence which may be logically substantial in isolation may be deprived of much of its character or its claim to credibility when considered with other evidence.');

and Universal Camera Corp v. N.L.R.B. (1951) 340 U.S. 474, 487-88, 71 S.Ct. 456, 95 L.Ed. 456."

Secondly, "opinions not supported by facts, and which are contrary to the physical facts and do violence to scientific principle or reason, are robbed of all probative value." Weinberg v.



Northern Pac. Ry. Co., 150 F.2d 645, 651 (8th Cir. 1945). See Anderson v. Knox, 297 F.2d 702, 719-20 (9th Cir. 1961); United States v. Honolulu Plantation Co., 182 F.2d 172, 178 & n.15 (9th Cir. 1950); and United States v. 102.93 Acres of Land, Etc., 154 F.Supp. 258 (E.D.N.Y.1957), aff'd sub nom. United States v. Fox, 257 F.2d 805 (2d Cir. 1958).

Finally, this Court has in the past refused to credit the testimony of Government witnesses on facts similar to those in the case at bar. In Verrue, supra, this Court affirmed the District Court's reversal of the Secretary's decision invalidating a sand and gravel mining claim for lack of discovery of a valuable mineral deposit. In reaching this conclusion, the Court noted that the crucial issue was marketability and that the testimony of the three Government witnesses "sheds no light on that issue"



because none of them had been in the area of the mining claim during the crucial period "nor did any one of them have personal knowledge of the sand and gravel market during that time." id. at 1204.

Fisher's opinion, on which the Secretary exclusively relies, neither avoids the inadequacies noted in Verrue, supra, nor is it supported by the other facts in the record. It was based upon an investigation begun more than ten years after the close of the crucial period. Although he stated he was familiar with the Las Vegas area, there was no indication that he was familiar with that area during the crucial period. In addition, his opinion was not based on personal knowledge of the sand and gravel market during that period. Rather, he gleaned his information solely from a visual inspection of the terrain, a review of reports and interviews with others, all conducted more than ten



years after the crucial period. More importantly, his opinion was flatly contradicted by the Hill report which was based upon an investigation completed within one year of the crucial period and also by direct evidence of marketability supplied by persons who had actually witnessed substantial recoveries from the claims up and down the valley or wash. In light of these factors, we must conclude that the Board improperly credited Fisher's unfounded opinion of nonvalidity.

Issue 2-(a):

A discovery of valuable sand and gravel deposits on Claims 1 through 22, containing workable deposits of sand and gravel of like character and quality with the material in Claim 10, is clearly established by the record.

Issue 2-(b):

[2] The marketability of the pre-July 23, 1955 extractions can be tested by



reason of: (1) Accessibility to the claims; (2) Bona fides of the operators in developing the claims; (3) Existence of market demand within reasonable proximity to the claims; and (4) Actual participation in the market. See *clear Gravel Enterprises*, supra at 181.⁶

The relevant evidence in the record established that:

(1) Accessibility of Charleston's Claims 1 through 22 was readily available. The area of the wash was not remote but, to the contrary, readily available to major public roads;

6. Contrast with the holding in *Humboldt Placer Mining Company v. Secretary*, 549 F.2d at 625 (9th Cir. 1977), where this Court reemphasized its holding in *Verrue*, supra, that "positive evidence in the record of marketability" was not offset by evidence of the lack of sales of material and the availability of comparable material from other sources.²

Footnote 2 reads: "in *Melluzzo v. Morton*, 534 F.2d 860, 863 (9th Cir. 1976), we construed *Verrue* as holding that lack or insubstantiality of sales of material from the claims in question is relevant to the question of marketability. It is not, however, conclusvie proof of lack of value. The inference to that effect, when all evidence is considered, can be found to have been overcome by evidence of marketability."

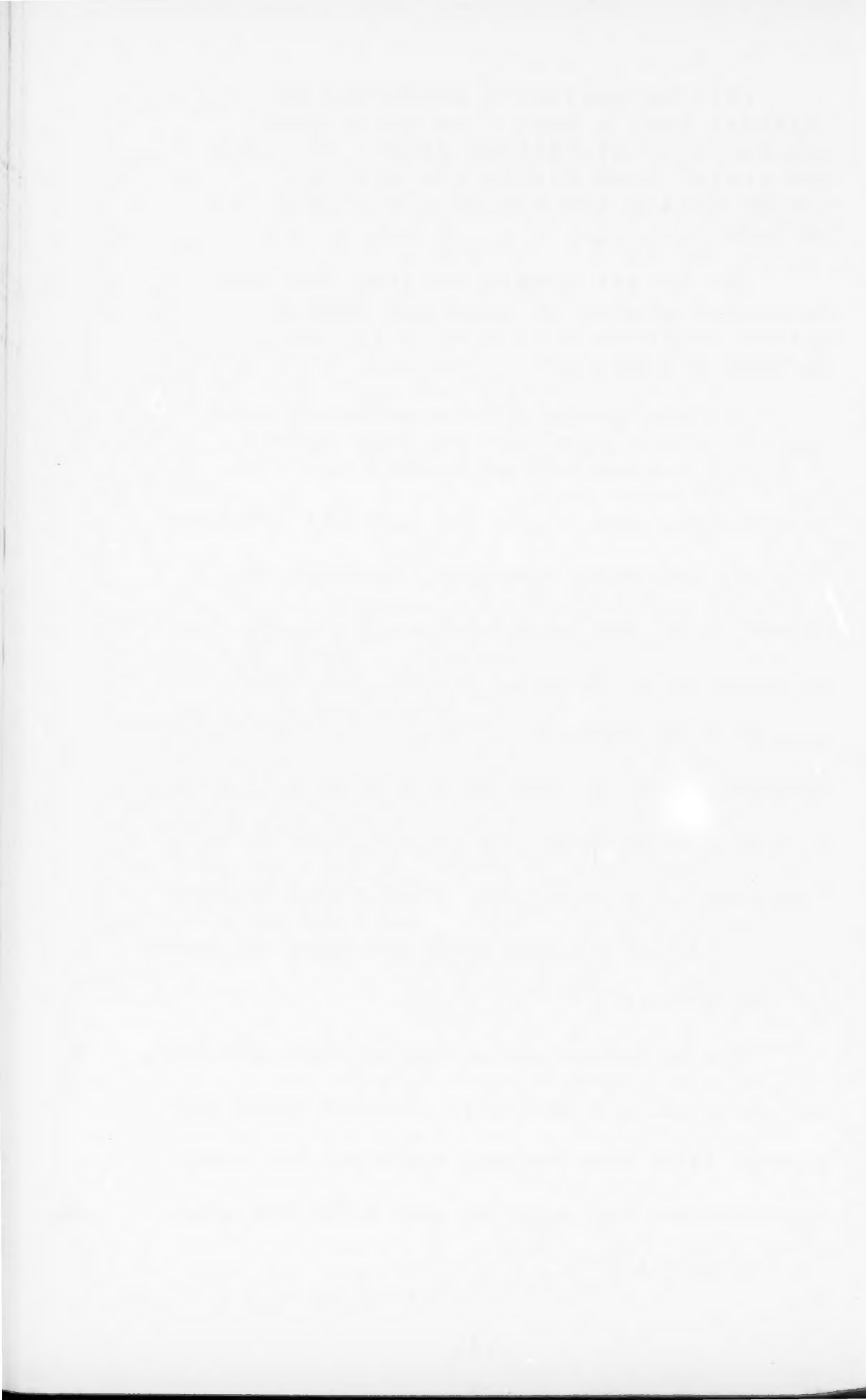
(2) Charlestone's predecessors in interest made a bona fide development and recovery of various grades of sand and gravel from within the several claims during the pre-July 23, 1955 period;

(3) Market demand existed for the extracted grades of sand and gravel within reasonable proximity to the various claims; and

(4) The predecessors actually sold the recovered material in that market.
The evaluation as to whether

Charlestone met tests (3) and (4) deserves further comment. Fisher's opinion of nonvalidity was based primarily upon: (a) An absence of washing water; (b) The sporadic operations of Southern and Brawner; and (c) The prohibitive distance of the claims from the market. We are convinced that each of those reservations was nullified by the only relevant evidence in the record.

The evidence established that Southern and Brawner did actually recover sand and gravel from the claims, transported those extractions for washing and sold the same on the market.



[3] The seemingly sporadic operations by Southern and Brawner were a mirror of the building and construction industry in the Las Vegas area during and shortly after World War II. Continuous operation of a placer mining claim is not a per se requisite to proving the validity of that claim. Cessation of operation of any economic enterprise may be caused by innumerable factors totally beyond the bona fide intentions of the operator. Reason dictates that periodic cessation of operation of a placer mining claim, short of an intentional abandonment of the claim, need not defeat ultimate proof of validity.

Since a total absence of operation does not preclude a finding of validity (Verrue, supra), it follows that sporadic operation does not preclude a finding for validity. The Secretary does not contend there was a pre-July 23, 1955 abandonment of the claims by Brawner. In fact, as of



July 23, 1955, Brawner was engaged in the profitable extraction of sand and gravel from the various claims.

The Fisher postulate of an excessive distance of the claims from the market is meaningless. Some competitors in the sand and gravel business are next door to a construction project; yet a distant competitor underbids and successfully competes with the next door neighbor. The inescapable fact is that market demand supported the recovery and sale of material from the claims.

[4] The prudent person test has enough flexibility to allow a sand and gravel business operator to undertake an apparently marginal enterprise if it has a reasonable possibility of success. Relying on Fisher's opinion, the Secretary deemed Brawner to have been a foolhardy operator; yet in many circles, pre-July 23, 1955 Las Vegas area entrepreneurs would have been deemed astute.



Finally, we conclude that the District Court's finding that "at least the claims numbered 1 through 16 have been proved valid" is not clearly erroneous. Fed.R.Civ.P. 52(a).

[5-7] Furthermore we agree with the District Court's conclusion that Charlestone must be permitted access to Claim 22 in order to utilize the water recovered from the well in the operation of the other valid claims. However, we reach our conclusion upon a rationale other than that relied upon by the District Court.

It is agreed that the Murphy location notices were lawfully filed under the Acts of Congress. Each of the location notices, covering Claims 1 through 22, described a "piece of mineral bearing ground as a Placer claim" as distinguished from a claim location of any particular mineral, either surface or underground, within that tract of ground. "A placer location is the



location in accordance with those acts [of congress] of a tract of land for the mineral bearing or other valuable deposits upon or within it that are not found in lodes or veins in rock in place." Webb v. American Asphaltum Min. Co., 157 F.203, 204 (8th Cir. 1907). See also 1 American Law of Mining §5.10 (1976).

We are staisfied that Charlestone, as Murphy's successor, had the right to appropriate and utilize as a mineral the water within any of the claims which met the above two prong test of value and success in development. It has been said that "'Mineral' is a word of general language, and not per se a term of art . . . It is not capable of a definition of universal application, but is susceptible to limitation or expansion according to the intention with which it is used in the particular . . . statute." Bumpus v. United States, 325 F.2d 264, 266 (10th Cir. 1963).



Since early times, water has been regarded as a mineral. "[T]he term 'mineral' has been held to embrace water, particularly subterranean water, irrespective of the character and quantity of salts and gases which may be in solution." 58 C.J.S. Mines & Minerals §2(7) (1948). (Footnotes omitted). Water itself may be classified as a mineral. United States v. Union Oil Co. of California, 549 F.2d 1271, 1273 (9th Cir. 1977).

The pertinent Acts of Congress which allow a prospector to enter and patent placer claims for valuable minerals do not expressly define water as a non-mineral. In Union Oil Co., supra at 1273 this Court hazards that "Congress was not aware of geothermal power when it enacted the Stock-Raising Homestead Act in 1916; it had no specific intention either to reserve geothermal resources or to pass title to



[the Stock-Raisers]." It is common knowledge that the successful recovery of many "hard" minerals from the earth and the utilization of the soft mineral of water therewith go hand in hand. American Law of Mining §2.71 (1976). Therefore, it would be incongruous for us to hazard that Congress was not aware of the necessary glove of water for the hand of mining and therefrom Congress impliedly intended to reserve water from those minerals allowed to be located and recovered. In any event we decline to do so.

The limitation in 30 U.S.C. §611 on the location of claims for common varieties of certain named minerals does not apply to water. In fact, the express language of §611 exempts from its operation "some other mineral occurring in or in association with such deposit." Therefore, it is of no importance that the discovery of water within Claim 22 occurred after July 23, 1955.



The water recovered from the source under Claim 22⁷ undeniably has an intrinsic value in the desert area. There is by the nature of Charlestone's operations no evidence of a profitable market of the water per se for either domestic or irrigation uses. Nevertheless the only relevant evidence in the record demonstrates the existence of a profitable market of the water as a washing agent for the sand and gravel recovered from the valid claims. Although unwashed sand and gravel has a limited market, good quality sand and gravel in combination with water draws a premium market.

We are satisfied that Charlestone has shown a profitable market for the water recovered upon Claim 22 and its claim for the extraction of that water is valid.

7. This District Court noted that the source of water under Claim 22 was present on the date of Murphy's notice of location.

The judgment of the District Court entered on November 8, 1974, vacating the decision of the Board dated January 18, 1973 and remanding the cause to the Secretary is affirmed, and the cause is remanded to the District Court for further order of remand to the Secretary consistent with the foregoing.

AFFIRMED AND REMANDED.



UNITED STATES COURT OF APPEALS
For The District of Columbia Circuit

No. 14953

EVERETT FOSTER, ET AL., APPELLANTS

V.

FRED A. SEATON, SECRETARY OF THE INTERIOR,
APPELLEE

Appeal from the United States District
Court for the District of Columbia

Decided October 22, 1959

Mr. Leo A. Huard, with whom Messrs.
Ralph E. Becker and F. Murray Callahan were
on the brief, for appellants.

Mr. Claron C. Spencer, Attorney,
Department of Justice, with whom Mr. S.
Billingsley Hill, Attorney, Department of
Justice, was on the brief, for appellee.
Mr. Roger P. Marquis, Attorney, Department
of Justice, also entered an appearance for
appellee.

Before PRETTYMAN, Chief Judge, and
BAZELON and BURGER, Circuit Judges.



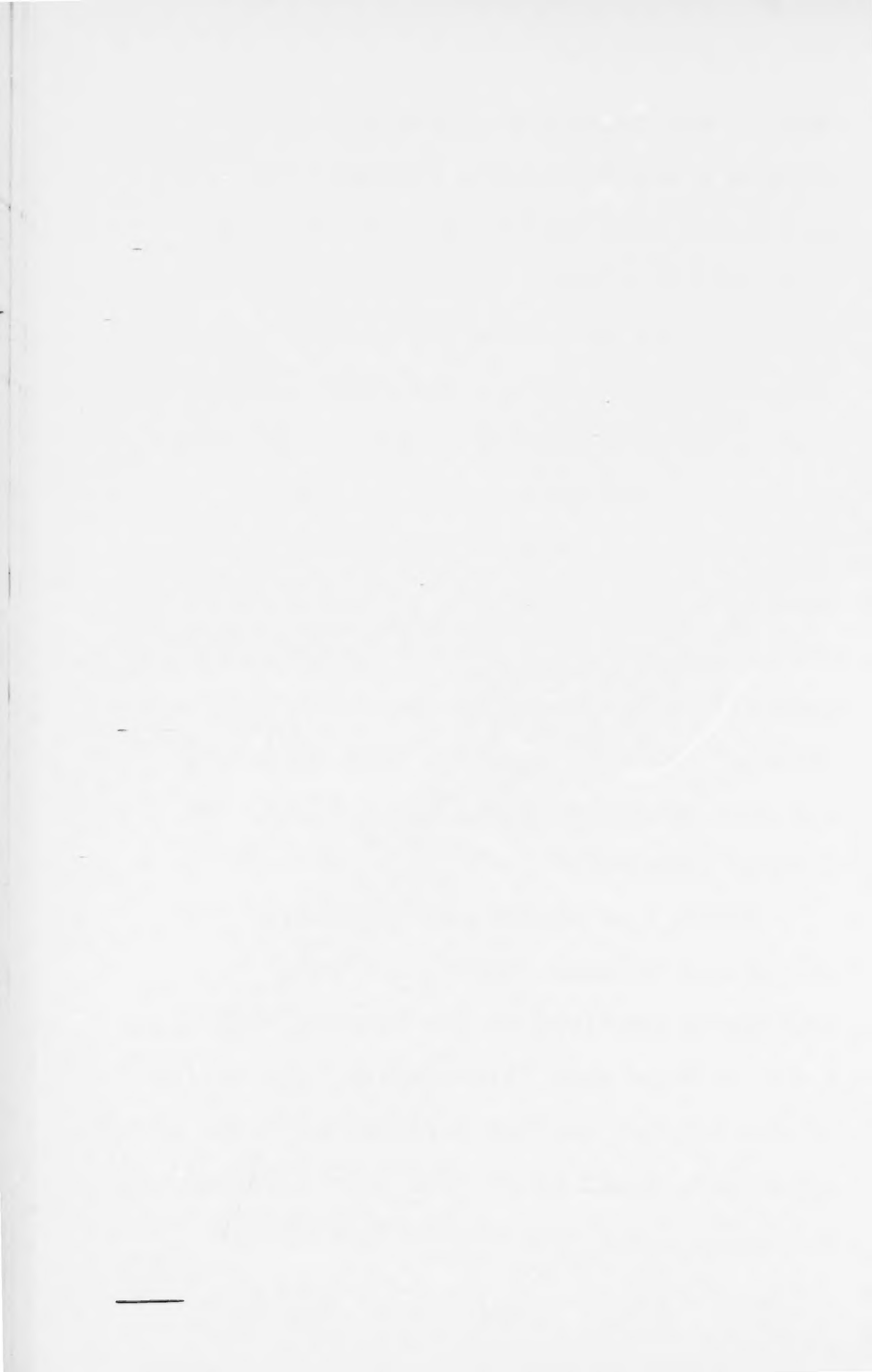
PER CURIAM: This case relates to Appellants' claims under provisions of the mining laws which authorize "occupation and purchase" of Government lands containing "valuable mineral deposits." Rev. Stat. §2319, 2325, 2329 (1875), 30 U.S.C. §22, 29, 35 (1952). The Department of the Interior instituted proceedings contesting the claims on the ground that the allegedly "valuable mineral deposits" of sand and gravel, located thirteen miles from the center of Las Vegas, Nevada, were insufficient, inter alia, in quantity, quality and accessibility to a market to constitute a valid discovery. The hearing officer rendered a decision favorable to appellants, but it was reversed by the Director of the Bureau of Land Management upon an appeal by rival claimants who had intervened to assert an interest in the land under the Small Tract Act, 68 Stat. 239 (1954), 43 U.S.C. §682(a) (Supp. v.

1958). The Secretary of the Interior sustained the Director's ruling.

Appellants then instituted this suit in the District Court under the Administrative Procedure Act to review the Secretary's decision. On cross motions, the District Court granted a summary judgement in favor of appellee and this appeal followed.

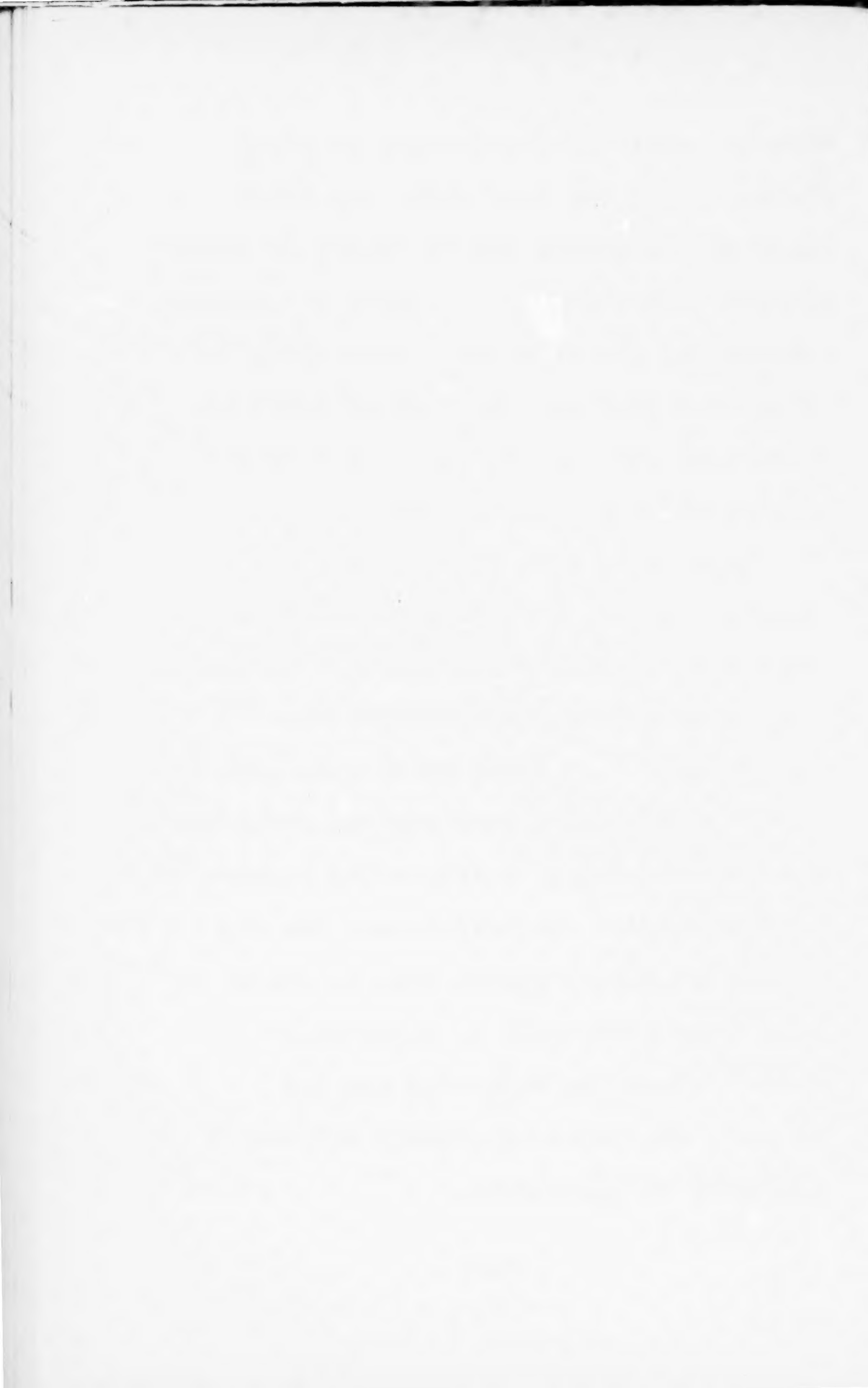
Appellants have raised a number of points relating to errors of procedure and statutory interpretation allegedly committed throughout the administrative process. We have examined them carefully and find no merit in the contentions. We discuss them briefly.

Appellants claim that they were prejudiced because intervenors were improperly admitted to the hearing, and that, without such intervention, the ruling of the initial hearing examiner in favor of appellants would never have been appealed and hence never reversed.¹ It is clear,



however, that the intervenors as rival claimants for the land under the Small Tract Act, allowing the Secretary to lease or sell vacant Government lands for certain residential and commercial uses, were interested parties. We find no basis for disturbing the administrative action with respect to this intervention.

Appellants also contend that the hearing examiner erroneously denied their request to examine a confidential document from which a Government witness was testifying. The record shows that upon the witness' claim of a governmental privilege appellants' counsel withdrew his request for disclosure. Thereafter the hearing officer expressly stated that he would, if again requested, rule in appellants' favor. Since the objection was not revived, the point is plainly not now available to appellants.



Appellants' third allegation of error is that the Secretary failed to hold the Government to the standard of proof required by the Administrative Procedure Act, which states that "the proponent of a rule or order shall have the burden of proof." 60 Stat. 241 (1946), 5 U.S.C. §1006 (1952). The Secretary ruled that, when the Government contests a mining claim, it bears only the burden of going forward with sufficient evidence to establish a prima facie case, and that the burden then shifts to the claimant to show by a preponderance of the evidence that his claim is valid.² The short answer to appellants' objection is that they, and not the Government, are the true proponents of a rule or order; namely, a ruling that they have complied with the applicable mining

2. This is the standard which the Department of Interior has applied for a number of years. See *United States v. Strauss*, 59 L.D. 129 (1945).

laws. One who has located a claim upon the public domain has, prior to the discovery of valuable minerals, only "taken the initial steps in seeking a gratuity from the Government." *Ickes v. Underwood*, 78 U.S. App. D.C. 396, 399, 141 F.2d 546, 549, cert. denied, 323 U.S. 713 (1944); Rev. Stat. 2319 (1875), 30 U.S.C. §23 (1952). Until he has fully met the statutory requirements, title to the land remains in the United States. *Teller v. United States*, 113 Fed. 273, 281 (8th Cir. 1901). Were the rule otherwise, anyone could enter upon the public domain and ultimately obtain title unless the Government understood the affirmative burden of proving that no valuable deposit existed. We do not think that Congress intended to place this burden on the Secretary.

Appellants' principal assignment of error is that the Secretary misinterpreted

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the statute by requiring a demonstration of present value. They earnestly contend that their claim can also be sustained on the basis of prospective market value.

The statute says simply that the mineral deposit must be "valuable." Rev. Stat. §2319, 30 U.S.C. §22. Where the mineral in question is of limited occurrence, the Department, with judicial approval, has long adhered to the definition of value laid down in *Castle v. Womble*, 19 I.D. 455, 457 (1894):

Where minerals have been found and the evidence is of such a character that a person of ordinary prudence would be justified in the further expenditure of his labor and means, with a reasonable prospect of success, in developing a valuable mine, the requirements of the statute have been met.

With respect to widespread non-metalli[c] minerals such as sand and gravel, however, the Department has stressed the additional requirement of present marketability in order to prevent



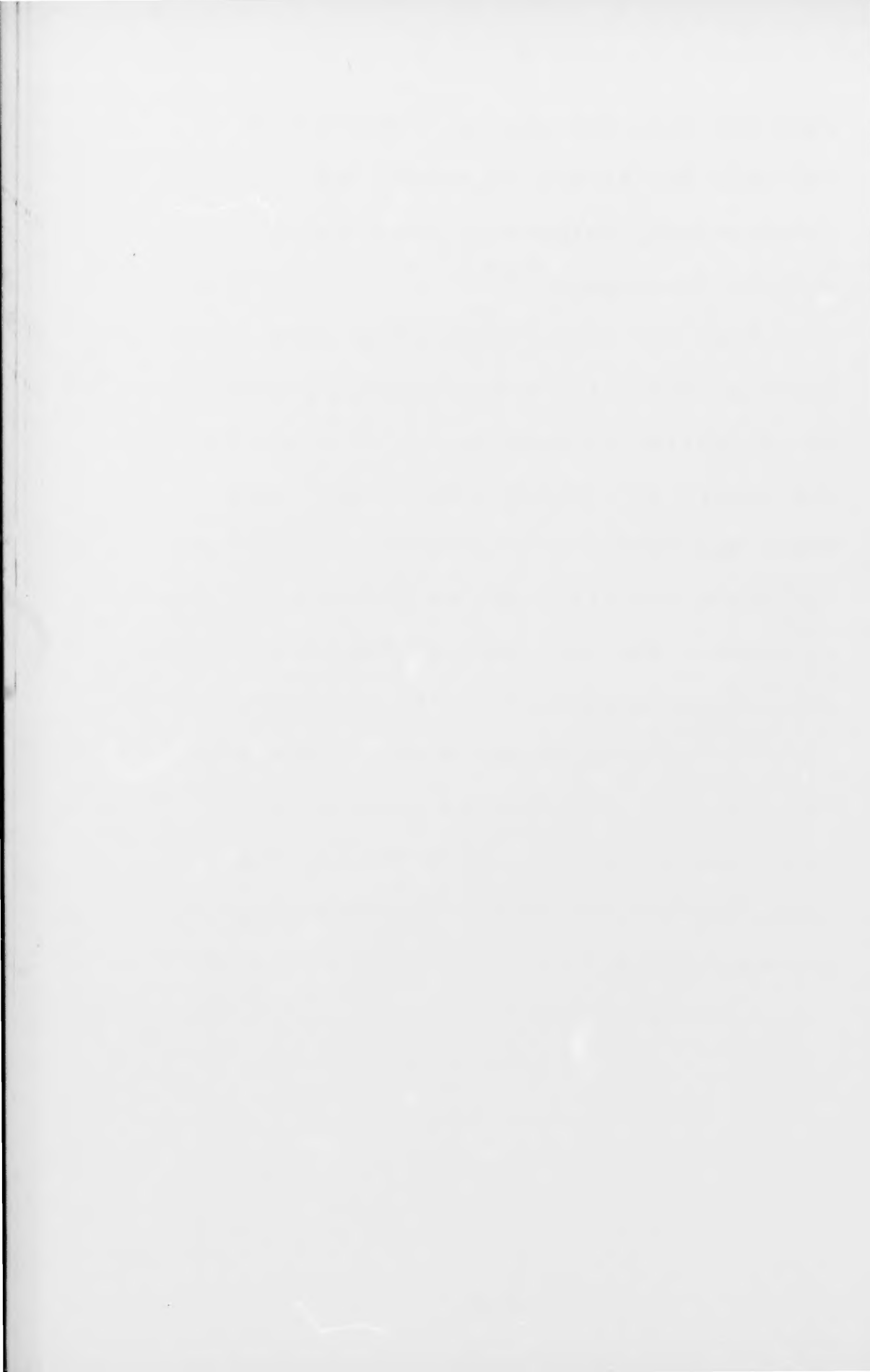
the misappropriation of lands containing these materials by persons seeking to acquire such lands for purposes other than mining. Thus, such a "mineral locator or applicant, to justify his possession, must show that by reason of accessibility, bona fides in development, proximity to market, existence of present demand, and other factors, the deposit is of such value that it can be mined, removed and disposed of at a profit." Layman v. Ellis, 54 I.D. 294, 296 (1933), emphasis supplied. See also Estate of Victor E. Hanny, 63 I.D. 369, 370-72 (1956). Particularly in view of the circumstances of this case, we find no basis for disturbing the Secretary's ruling. The Government's expert witness testified that Las Vegas Valley is almost entirely composed of sand and gravel of similar grade and quality. To allow such land to be removed from the public domain because unforeseeable developments might



some day make the deposit commercially feasible can hardly implement the congressional purpose in encouraging mineral development.

Thus the case really comes down to a question whether the Secretary's finding was supported by substantial evidence on the record as a whole. We think it was. There may have been substantial evidence the other way also, but we do not weigh the evidence. The testimony of Shafer and his colleagues in support of the Government was clearly substantial and most certainly was not destroyed. He was an experienced man, knew sand and gravel, knew the Las Vegas area, and his testimony was clear, succinct and convincing.

Affirmed.



UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

ROBERT L. MENDENHALL)	
	)	No. 83-1751
Appellant,)	
	)	D.C. No.
vs.	)	CV-R-80-146-ECR
)	
UNITED STATES OF	)	MEMORANDUM*
AMERICA, and UNITED)	
STATES DEPARTMENT OF)	
INTERIOR, et al.,)	
)	
Appellees.)	

Appeal from the United States District
Court for the District of Nevada
Edward C. Reed, District Judge, Presiding
Argued and Submitted: March 16, 1984

Before: TANG and PREGERSON, Circuit Judges,
and HATTER** District Judge.

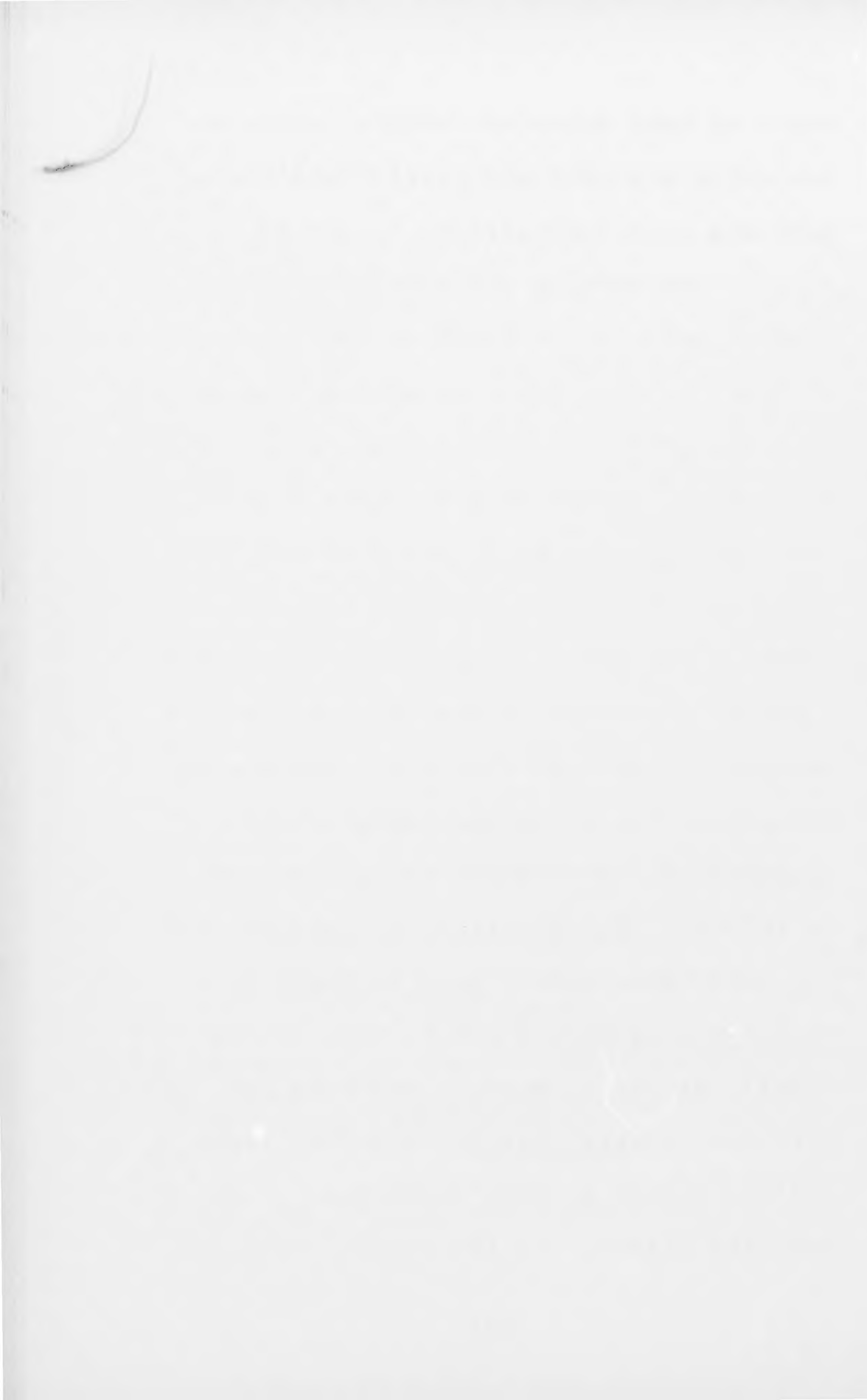
Robert L. Mendenhall appeals the
district court's affirmance of the Interior

* The panel has concluded that this appeal presents issues that do not meet this court's standards for disposition by written opinion. See 9th Cir. R. 21. Therefore, we order disposition by memorandum rather than by publication in the Federal Reporter. This memorandum may not be cited to or by the courts of this circuit.

** Hon. Terry J. Hatter, Jr., United States District Judge, Central District of California, sitting by designation.

Board of Land Appeals' (IBLA's) decision declaring his sand and gravel land claims null and void. We affirm.

In reviewing a decision of the IBLA or a Department of the Interior Hearing Officer, we consider only whether the decision was arbitrary, capricious, an abuse of discretion, or not in accordance with law. Melluzzo v. Watt, 674 F.2d 819, 820 (9th Cir. 1932); 5 U.S.C. 706 (2) (e) (1982). The proper standard for evaluating a placer discovery is whether a reasonable prospect of success exists for the mining operation, including consideration of exploration, development and present marketability. United States v. Coleman, 390 U.S. 599, 602 (1968); Best v. Humboldt Placer Mining Co., 371 U.S. 334, 335-36 (1963); Barton v. Morton, 498 F.2d 288, 291 (9th Cir.), cert. denied, 419 U.S. 1021 (1974); Castle v. Womble, 19 Pub. Lands Dec. 455 (1894). In the case of sand and



gravel claims, the discovery evaluation standard must be applied as of July 23, 1955. 30 U.S.C. 611 (1976).

The Hearing Officer's finding that Mendenhall's predecessor-in-interest, Sullivan, failed to carry his burden of showing marketability potential as of July 23, 1955 is supported by substantial evidence. The Hearing Officer found that Sullivan's "statements relating to removal of sand and gravel were couched in very general terms." The value of the claims as of July 23, 1955 was not established. Sullivan was the only witness on behalf of his own claim, and the Hearing Officer found that he "present[ed] only infirm or inconsistent recollection rather than adequate records or other reliable evidence." The Hearing Officer found that Sullivan failed to show that sand and gravel was marketed or that there was a profitable outlet for sand and gravel as of



July 23, 1955. The Hearing Officer applied the proper standard, and nothing in the record establishes discovery and marketability potential as of July 23, 1955.

After the government established a prima facie case, the burden of proving marketability rested on Sullivan. Humboldt Placer Mining co. v. Secretary of Department of Interior, 549 F.2d 622, 624 (9th Cir. 1977) (citations omitted). Because the showing was not made, the Hearing Officer's decision was proper.

AFFIRMED.

Filed: May 1, 1984
Phillip B. Winberry
Clerk, U.S. Court of Appeals

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ROBERT L. MENDENHALL)	
Appellant,	)	No. 83-1751
)	
vs.)	
)	
UNITED STATES OF	)	O R D E R
AMERICA, and UNITED)	
STATES DEPARTMENT)	
OF INTERIOR, et al,)	
)	
Appellees.)	
)	

Before: TANG and PREGERSON, Circuit Judges,
and HATTER* District Judge.

The panel as constituted above has
voted to deny the petition for rehearing.
Judges Tang and Pregerson voted to reject
the suggestion for rehearing en banc and
Judge Hatter recommended such rejection.

The full court has been advised of the
suggestion for rehearing en banc, and no
judge of the court has requested a vote on
the suggestion for rehearing en banc. Fed.
R. App. P. 35 (b).

* The Honorable Terry J. Hatter, Jr., United States
District Judge for the Central District of California,
sitting by designation.

The petition for rehearing is denied,
and the suggestion for rehearing en banc is
rejected.

Filed: June 28, 1984
Phillip B. Windberry
Clerk U. S. Court of Appeals

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

ROBERT L. MENDENHALL)	
Plaintiff,	)	Civil No.
	)	R-80-146-ECR
v.)	
	)	AFFIDAVIT OF
THE UNITED STATES OF	)	GEORGE A. KIERSCH
AMERICA, THE UNITED)	
STATES DEPARTMENT OF)	
INTERIOR, and CECIL D.)	
ANDRUS, Secretary of)	
the Interior and)	
EDWARD F. SPANG, State)	
Director of Nevada)	
Bureau of Land)	
Management,)	
Defendant.)	

AFFIANT, being first duly sworn upon
oath, avows and deposes as follows:

1. That I, GEORGE A. KIERSCH, Affiant
herein, am a registered professional geolo-
gist and engineer in Arizona (1750) and in
California as geologist (928) and engineer-
ing geologist (362) with degrees of
Geological Engineer and Ph.D.
(geology/mining). My varied geological
experience over a 40-year span is mainly
relevant to engineering and mineral



resources projects, having served as a Consultant, Manager of Exploration and/or Geologist for over 100 projects in the United States and in foreign countries. My address is: 4750 N. Camino Luz, Tucson, Arizona 85718. A specific description of my background is set forth in the attached resume as Exhibit "A".

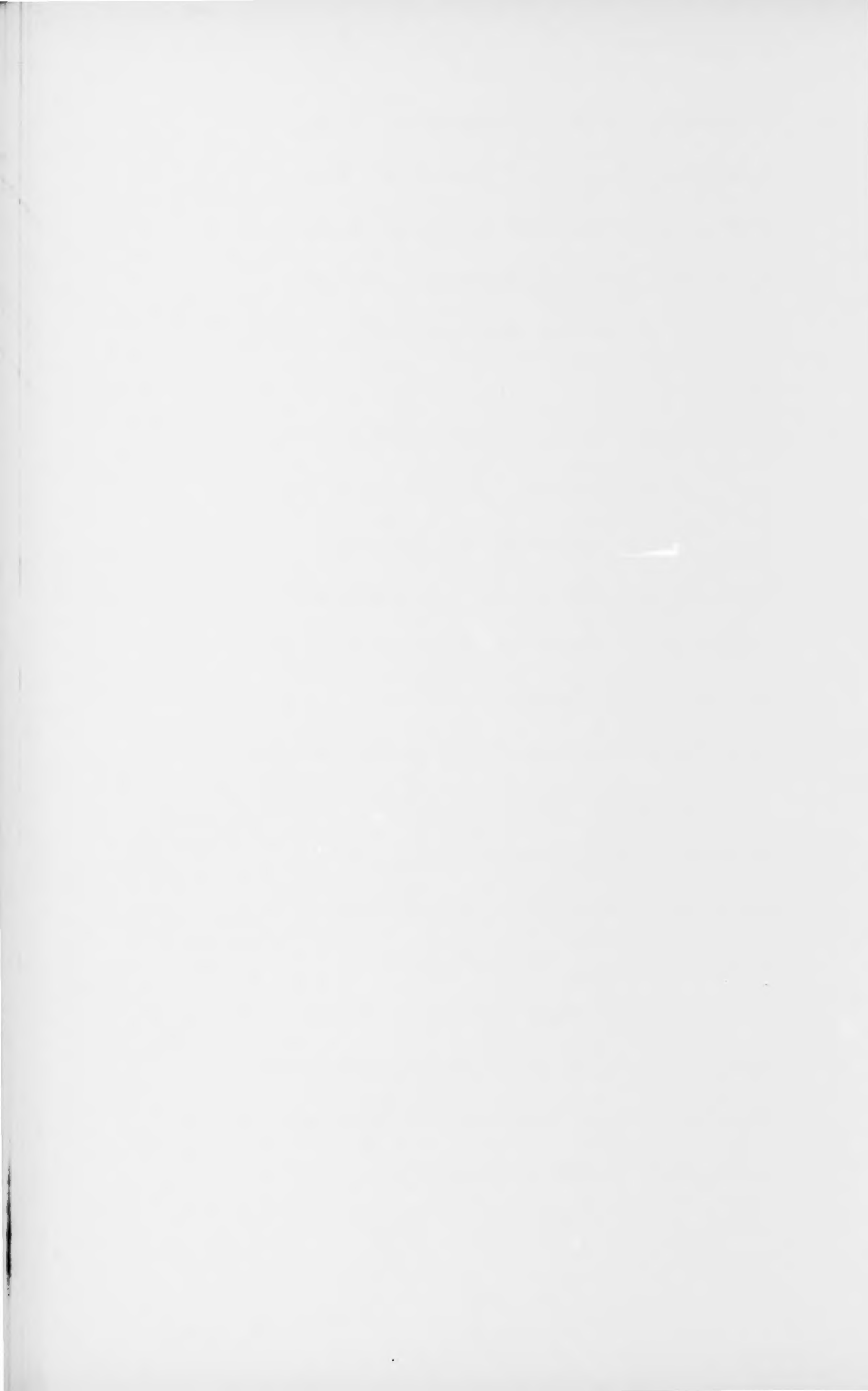
2. That I examined the Charleston claim numbers 24/39 (involved with the lawsuit described above) and numbers 1-23 on the edge of the Spring Mountains as to their geologic setting, origin and principal characteristics of the aggregate deposits thereon, and associated features. The naturally high-quality aggregate deposits that occur throughout the claims were examined for composition and physical properties. Their use for asphalt concrete aggregate was reviewed in-depth with Mr. Robert L. Mendenhall of Las Vegas Paving Company. The following reports,



maps, and sources of information on the geology, aggregate resources and production records for the deposits were reviewed:

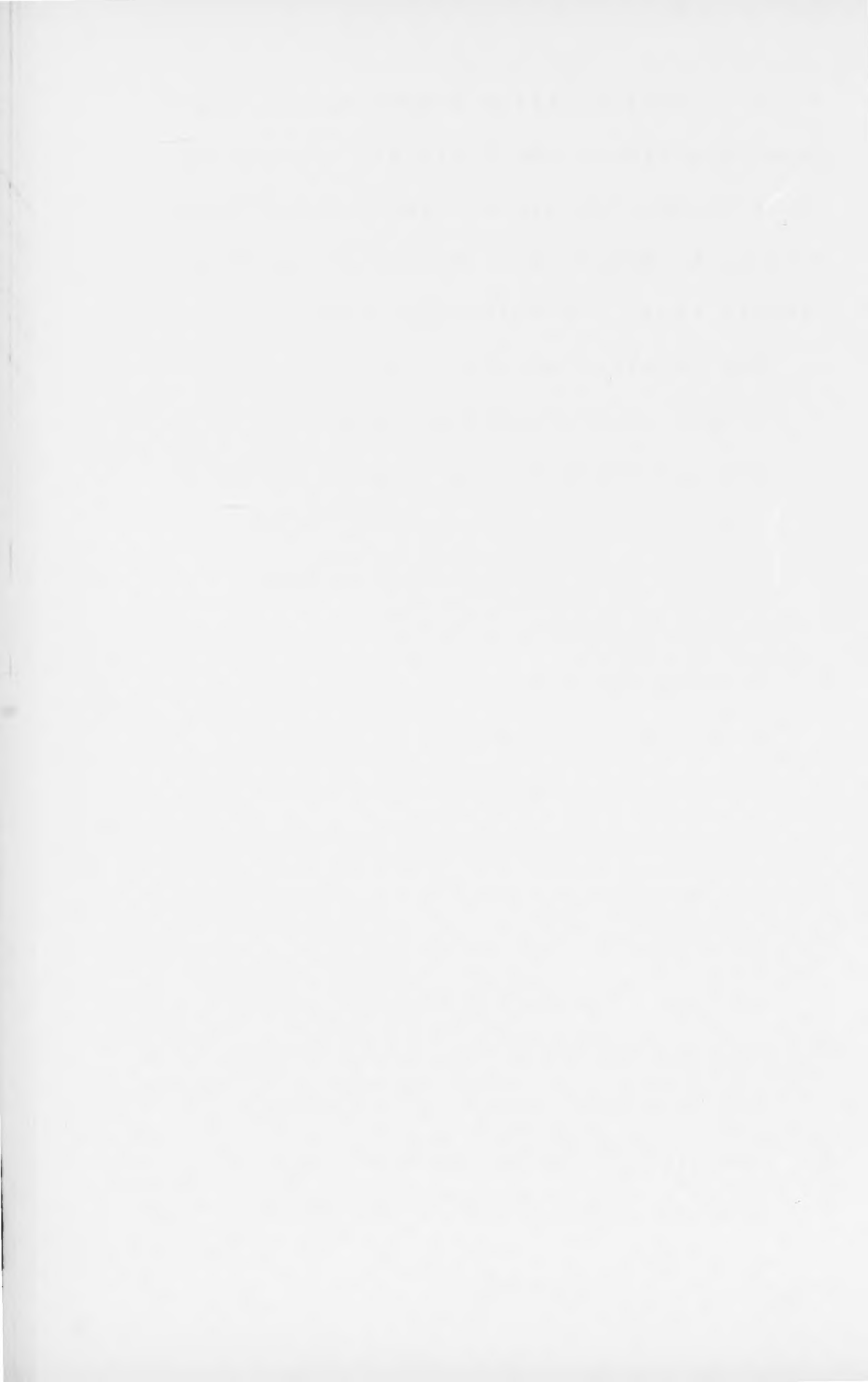
- a. Dames & Moore Consultants, 1968,
Report of investigation of sand and
gravel placer claims near Las Vegas,
Nevada for Charleston Stone
Products: By Toland, George C.
April 30, 1968.
- b. Randle Associates, 1981, Results of
tests for consumption asphalt
cement: For Las Vegas Paving Co.,
(May 20, 1981).
- c. Western Technologies, 1982, Results
of tests for consumption asphalt
cement: For Las Vegas Paving Co.
(June 24, 1982).
- d. U.S. Bureau of Land Management,
1982, Contract agreement for sale of
sand/gravel (Base Course) to Gilbert
Development Corp. (January 13,
1982).

- e. Longwell, C.R., Pampeyan, E.H.,
Bousyen, Ben, and Roberts, R.J.,
1965, Geology and mineral deposits
of Clark County Nevada: Nevada
Bureau of Mines Bulletin 62, 177p,
maps.
- f. Burchfeld, B.C., Fleck, R.J., Secor,
D.T., Vincelette, R.R. - and Davis,
G.A. 1974, Geology of Spring
Mountains, Nevada: Geological
Society of America Bulletin, Vol.
85, P. 1013-1022.
- g. Las Vegas Paving Co., 1982, Summary
of aggregate production July 1979 -
August, 1982 (August 23, 1982).
- h. Maps of Charleston Stone/Sullivan
Claims (No. 1-23 and 24/39).
- i. Topographic maps of Corn Creek
Springs and Blue Diamond quadrangles
Nevada: U.S. Geological Survey
1:62,500, 1952 edition.



3. That I, after examining the aggregate deposits in the field and discussing their production history and service record with R. L. Mendenhall, Plaintiff in this lawsuit, have the following observations:

- a. The physical characteristics and origin of the aggregate deposits on the Las Vegas Paving Company Claims (24/39) are similar to and inter-related with the Charleston Stone Claims (1-23).
- b. The aggregate deposits occur within a narrow valley carved in the steeply dipping Goodspring Dolomite beds (Spring Mountains) and continue eastward as a zone in the alluvial materials at the mouth of the canyon. The Spring Mountains are broadly folded and highly faulted. The Keystone thrust fault, a major feature of the Spring Mountains, is located immediately to the south of



the canyon where Claims 1 through 9 are located.. The deformation of the bedrock by the Keystone thrust actions have contributed to the widespread faulting and fracturing of the dolomite/limestone beds in the vicinity of the canyon. Consequently, when these beds deteriorate and are broken down by erosion and weathering processes, small sharp to angular rock fragments are formed -- largely under 1-inch in size.

Normal fluvial processes have distributed the varied-sized dolomite/limestone rock fragments along the canyon and throughout a limited area beyond the canyon's mouth and edge of the mountain slopes.

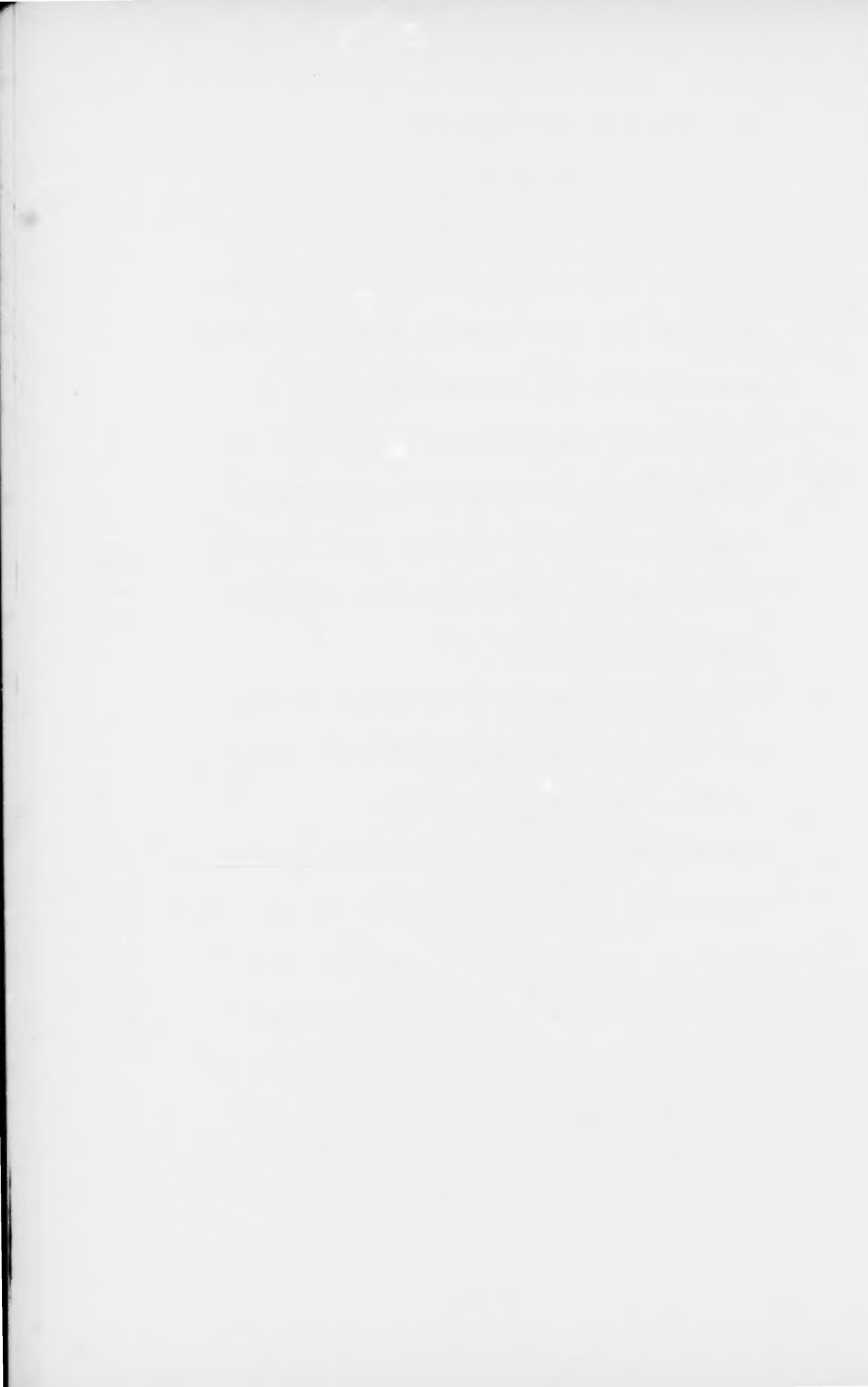
- c. The naturally occurring aggregate deposit throughout the area of Claims 24/39 and the Earlier Claims



10 to 23 consists of angular broken pieces of limestone rock with only minor rounding that are predominantly of well-graded sizes under 1-inch. The clean aggregate with only minor silt content consists of many-sided (6-8) rock fragments. Their ideal shapes allow the individual pieces of aggregate to knit and chink more closely together than a manufactured aggregate..

- d. The zone of naturally occurring aggregate is up to 15 feet thick in some parts of the Claims (24/39). The aggregate deposit is normally overlain by a thin, near-surface cap or zone of caliche-bearing sand/gravel, 3 to 6 feet thick. Recent geologic activity (regional uplift) has caused the intermittent water runoff from the canyon slopes to downcut through the zone of

- caliche cap throughout the approximate area of Claims 10 through 16. This downcutting has exposed the high-quality aggregate deposit in this sector and therefore essentially no stripping of overburden is necessary for mining.
- e. The angular, well-graded aggregate requires no washing and no crushing to meet specifications for use as asphalt concrete.
 - f. The natural gradation sizes of the pit-run aggregate fall within the range of asphalt concrete specifications. Consequently, only screening of the aggregate is needed to provide a balanced product for asphalt concrete.. An occasional block and piece greater than 1-inch in size is wasted by the screening process.

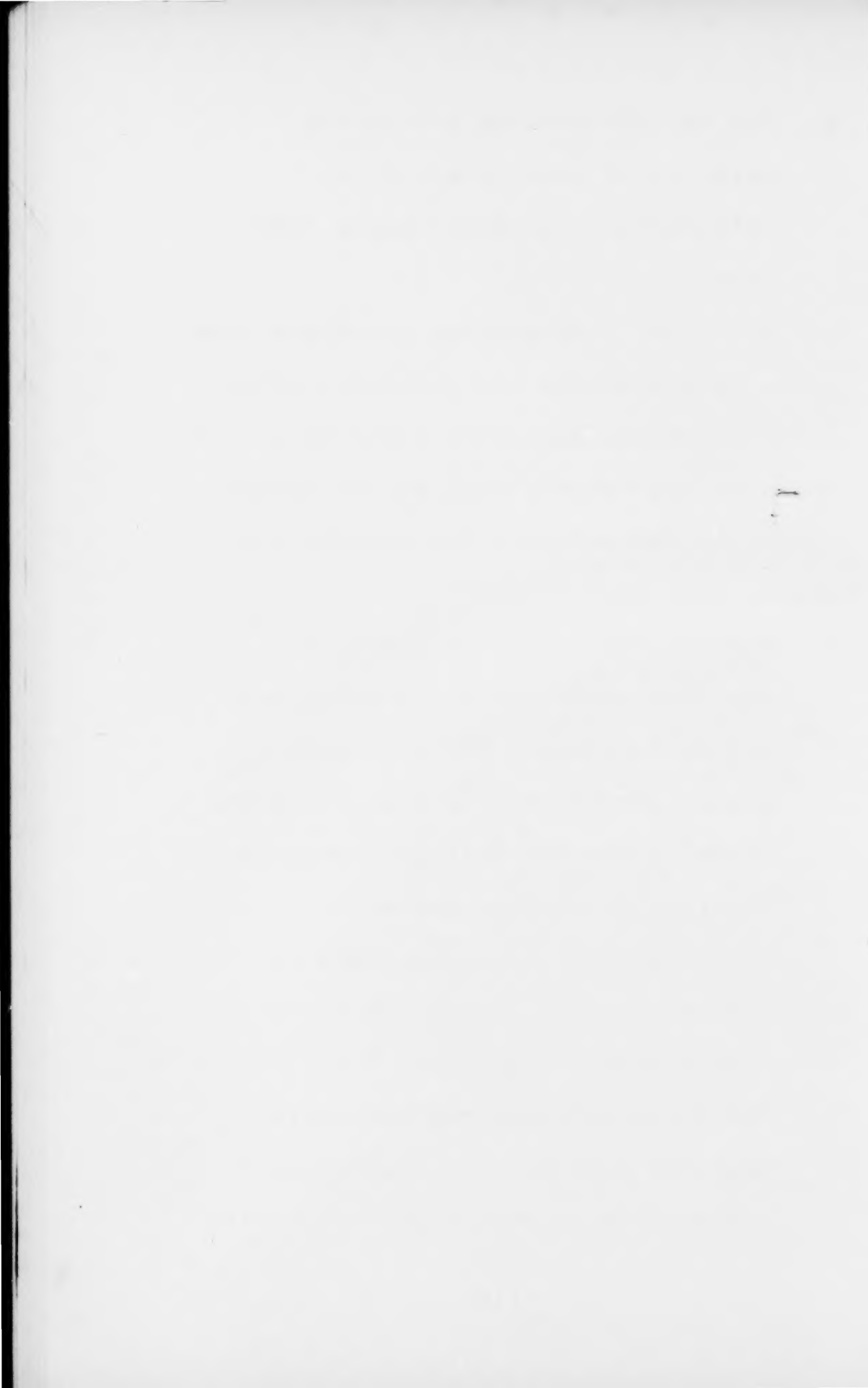


g. The caliche-bearing overburden material of lower-quality is satisfactory for Base Course (ABC) uses.

4. That I determined there are some physical properties and qualities which make the unique aggregate deposits of Las Vegas Paving Company (No. 24/39) specially useful in the industry for asphalt concrete, such as:

a. The natural occurring aggregate deposits on Claims 24/39 are clean and well-graded. The screened product meets grading specifications directly and the pit-run aggregate requires no washing and no crushing. Furthermore, there is almost no waste product of oversize rock pieces.

b. The dolomite/limestone aggregate requires considerably less asphalt consumption to meet asphalt concrete



standards than other aggregates in the region. This aggregate requires only 3.5 to 3.8% asphalt binder while the normal aggregate from this region requires 5% asphalt binder to meet standards. Consequently the Las Vegas Paving Company aggregate saves some 20 percent in asphalt costs for concrete mix. (For every 1% below the 5% normal there is a \$1.80/ton saving).

- c. The specific gravity of the pit-run aggregate averages 5 to 10 pounds heavier, at 161 pounds per volume unit, than the normal Las Vegas region aggregate at 149 pounds/volume unit. This characteristic is due to the natural angular shapes of the rock fragments which allow the close chinking and locking of grains in a mixture. This unique property of the

naturally occurring aggregate is superior to the grain locking of a manufactured aggregate.

- d. The well-graded natural occurrence of the aggregate -- requiring no crushing -- reduces production cost some \$0.50/ton.
- e. The several special and unique characteristics of the aggregate deposits combine for a very high-quality product at much lower overall costs for the production of asphalt concrete -- about \$3.20/ton below the costs for a normal gravelly material in the Las Vegas region.

5. That therefore, in my judgement, the deposit of naturally occurring, high-quality aggregate throughout the Charleston 24/39 placer mining claims is a valuable mineral deposit which possesses properties giving it distinct and special values for

which a long-term and expanding asphalt concrete market exists in the Las Vegas area for the foreseeable future.

FURTHER, Affiant sayeth not.

George A. Kiersch
GEORGE A. KIERSCH

STATE OF ARIZONA)
) ss.
COUNTY OF MARICOPA)

On this 31st day of August, 1982, personally appeared before me, the undersigned officer, George A. Kiersch, who acknowledged the above instrument.

Donna Metcalf
Notary Public

My commission expires May 3, 1986

**UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA**

ROBERT L. MENDENHALL)	
	)	Civil No.
Plaintiff,	)	R-80-146-ECR
)	
v.	)	AFFIDAVIT OF
)	
THE UNITED STATES OF	)	ROBERT L.
AMERICA, THE UNITED	)	MENDENHALL
STATES DEPARTMENT OF)	
INTERIOR, and CECIL D.	)	EXHIBIT 10
ANDRUS, Secretary of)	
the Interior and EDWARD)	
SPANG, State Director)	
of Nevada Bureau of)	
Land Management,)	
)	
Defendant.)	
)	

AFFIANT, being first duly sworn upon oath, avows and deposes as follows:

1. That I, Robert L. Mendenhall, the President of Las Vegas Paving Corporation and the Plaintiff herein, purchased the Charleston #24/39 association placer mining claim on March 7, 1979, which at that time contained excavations evidencing past production of from fifty thousand to one hundred thousand tons of naturally occurring high quality asphalt concrete

aggregate (N.O.H.Q.A.C.A.) and the Charleston 1 through 22 claims to the north contained evidence of production of at least three times that quantity for the previous forty years. (See Exhibit 8 attached hereto).

2. That I was born into the asphalt concrete aggregate business in that my father and his father before him specialized in the asphalt paving business in central Utah.

3. That in 1954 I moved to Las Vegas, Nevada, started the Las Vegas Paving Corporation, pioneered hot-mix asphalt recycling in America and have 28 patents for both equipment and processes for the Asphalt Concrete Aggregate Industry.

4. That during my thirty years working with Asphalt Concrete Aggregate, I have examined hundreds of aggregate sources in Utah, Nevada, California and Arizona and calculated the costs of processing the rock

occurring thereon into high quality Asphalt Concrete Aggregate.

5. That in early 1978 while searching for a source of High Quality Asphalt Concrete Aggregate in the Las Vegas area I flew the surrounding hills in search of such an aggregate source and first saw the Charleston claim area from the air, then visited the ground and found that this pitted area, within easy access of Las Vegas, contained a naturally occurring crushed and sorted aggregate that was uniquely suited for Asphalt Concrete Aggregate.

6. That I then went in search of the claim owners and found that Mr. Frank Sullivan owned the Charleston claims and I took an option to purchase the claims. Mr. Sullivan represented that he owned the claims and I went to the County recorder and searched the record for evidence that Sullivan owned the Charleston claims, and



found nothing that would indicate that the claims were not in good standing and then exercised my option and went to producing aggregate therefrom.

7. That as I produced the aggregate and used it in our hot asphalt mix designs - confirmed my belief that we had a superior quality aggregate which we could produce directly from the claims without crushing, washing, or any treatment other than screening out random oversized boulders and thus we had a Naturally Occurring High Quality Aggretate (N.O.H.Q.A.C.A.) which had the following qualities possessed by no other Asphalt Concrete Aggregate:

- a. The naturally occurring angular fragments lie an optimum distance from the source so that the corners are rounded just enough to fit snugly together to form a very dense finished product.

- b. The angular fragments are naturally sorted so that they fit all standard specifications for asphalt concrete aggregate.
- c. The angular fragments on Charleston 24/39 can be screened to produce surfacing "chips" (- 3/8th to + 3/16ths) for asphalt concrete pavements without crushing or other treatment of any kind.
- d. This naturally occurring high quality asphalt concrete aggregate requires low levels of asphalt (3.5% to 3.8%) where normal manufactured aggregates in the Las Vegas area require approx. 5% asphalt.
- e. The density of the resulting asphalt mix is higher than the normal asphalt aggregate by some 5 to 10 pounds per cubic foot.

FURTHER, Affiant sayeth not.

Robert L. Mendenhall

Robert L. Mendenhall

STATE OF NEVADA)
) ss.
County of Clark)

On this 9th day of Sept., 1982, before me personally appeared Robert L. Mendenhall, who acknowledged this document before me.

Rosemarie Heide Ward

Notary Public

My commission expires:
Sept. 17, 1983

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Supreme Court, U.S.
FILED

No. 84-718

JAN 9 1985

ALEXANDER L. STEVAS
CLERK

In the Supreme Court of the United States
OCTOBER TERM, 1984

ROBERT L. MENDENHALL, PETITIONER

v.

UNITED STATES OF AMERICA, ET AL.

**ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

**BRIEF FOR THE RESPONDENTS
IN OPPOSITION**

REX E. LEE

Solicitor General

F. HENRY HABICHT, II

Assistant Attorney General

ROBERT L. KLARQUIST

DONALD T. HORNSTEIN

Attorneys

Department of Justice

Washington, D.C. 20530

(202) 633-2217

FEB 15 PAGE 2

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QUESTION PRESENTED

Whether the courts below correctly refused to overturn the agency's prior finding that, as of July 23, 1955, petitioner's sand and gravel mining claims were not supported by the "discovery" of a valuable mineral deposit as required by the Mining Law of 1872, 30 U.S.C. 22.

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In the Supreme Court of the United States

OCTOBER TERM, 1984

No. 84-718

ROBERT L. MENDENHALL, PETITIONER

v.

UNITED STATES OF AMERICA, ET AL.

*ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT*

**BRIEF FOR THE RESPONDENTS
IN OPPOSITION**

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 101-104) is reported at 735 F.2d 1373 (Table). The opinion of the district court (Pet. App. 32-58) is reported at 556 F. Supp. 444. The decision of the Interior Board of Land Appeals (Pet. App. 26-31) is reported at 9 IBLA 278.

JURISDICTION

The judgment of the court of appeals was entered on May 1, 1984. A petition for rehearing was denied on June 28, 1984 (Pet. App. 105-106). Justice Rehnquist extended the time within which to file a petition for a writ of certiorari to November 5, 1984 (Pet. App. 1-2), and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Frank R. Sullivan filed two placer claims on federal lands in Clark County, Nevada, under the authority of the Mining Law of 1872, 30 U.S.C. 22. These claims, known as the "Charleston 24/39" claims, cover deposits of sand and gravel located approximately 12 miles northwest of Las Vegas (Pet. App. 27). Petitioner purchased the claims from Sullivan in 1979.

1. In 1965, while Sullivan still owned the claims, the United States instituted proceedings before the Department of the Interior contesting the validity of the claims. Specifically, the United States contended that the claims did not comprise a "discovery" of valuable minerals because the sand and gravel could not have been marketed profitably on or before July 23, 1955, the effective date of the Common Varieties Act, 30 U.S.C. 611, which removed all common varieties of sand and gravel from future location under the general mining law. After an administrative hearing, the Hearing Officer determined that Sullivan's claims did not contain valuable minerals and therefore were null and void (Pet. App. 3-25). The Hearing Officer specifically found that Sullivan had failed to establish that any sand and gravel actually had been marketed prior to July 23, 1955, or that, under known marketing conditions, there was an outlet for the profitable disposal of substantial quantities of sand and gravel from the two claims on or before July 23, 1955 (*id.* at 21-24). Sullivan had stipulated that the sand and gravel on the claims were "common varieties" within the meaning of the Common Varieties Act, and the Hearing Officer found this to be the case (*id.* at 4-5).

Sullivan appealed to the Interior Board of Land Appeals (IBLA). In that appeal, however, Sullivan did not challenge the Hearing Officer's findings of fact or conclusions of law regarding marketability (see Pet. App. 27). Rather, Sullivan contended only that the Hearing

Officer's decision should be set aside on due process grounds because Sullivan had been represented at the hearing by a non-lawyer. The IBLA rejected this contention and affirmed the decision (*id.* at 26-31), explaining (*id.* at 30) that Sullivan himself deliberately had chosen to forego the right to be represented by legal counsel.

The IBLA entered its decision on February 6, 1973 (Pet. App. 26). At no time thereafter did Sullivan seek judicial review of the IBLA's decision. On February 26, 1973, the United States Bureau of Land Management duly recorded a notice in the official records of the Clark County, Nevada, Recorder that the two mining claims had been adjudicated null and void (*id.* at 45).

2. More than six years later, on March 7, 1979, petitioner purchased the two claims from Sullivan (Pet. App. 45). After he discovered the adverse IBLA decision in the county records, petitioner brought this suit in the United States District Court for the District of Nevada to have the IBLA decision set aside. Basically, petitioner sought to adjudicate the validity of the two mining claims *de novo* in the district court. The district court, however, limited its review to two questions: (1) whether the Hearing Officer's decision applied the correct legal standards and was supported by substantial evidence (see *id.* at 47); and (2) whether the IBLA had abused its discretion in refusing to reopen and remand the case for a new hearing (see *id.* at 51).

The district court granted the government's motion to dismiss (Pet. App. 32-58). On the first question, the district court held that the Hearing Officer had applied the correct law in considering whether a "valuable" mineral existed and also held that substantial evidence supported the Hearing Officer's determination that no valuable minerals were discovered on Sullivan's two claims on or before the critical date of July 23, 1955 (Pet. App. 55-57). The district court specifically noted

(*id.* at 38-40) the testimony of the government's expert witness that no significant excavations of sand and gravel had occurred on the two claims prior to July 23, 1955, and that any market demand for those minerals could have been readily satisfied from then-existing sand and gravel operations.

On the second question, the district court allowed petitioner to submit exhibits purporting to demonstrate that the IBLA had abused its discretion in refusing to reopen the case. After reviewing the additional evidence, however, the court found that the additional evidence confirmed the Hearing Officer's conclusion that local demand for sand and gravel prior to 1955 was accommodated by existing sources of supply, leaving the sand and gravel on petitioner's mining claims unmarketable. Pet. App. 50-51. The district court also rejected petitioner's argument that Sullivan's representation at the administrative hearing by a non-lawyer constituted a due process violation. The district court explained that Sullivan had chosen to be represented by Robert J. McNutt, a civil engineer, and had persisted in his choice even after the agency itself insisted that Sullivan formally ratify, before a notary public, his decision to be represented by a non-lawyer. *Id.* at 34-36.

The court of appeals affirmed (Pet. App. 101-104). The court stated that "[t]he Hearing Officer found that Sullivan failed to show that sand and gravel was marketed or that there was a profitable outlet for sand and gravel as of July 23, 1955." *Id.* at 103-104. The court held that the Hearing Officer had applied the correct legal standard and that his decision was supported by the evidence.

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or of any other court of appeals. Moreover, petitioner raises no issue even arguably warranting review by this Court.

At the outset, we note that petitioner seeks review in this Court to overturn a 1973 IBLA decision to which he was not a party and from which no appeal was ever taken. In addition, the issues raised by petitioner are ones that were never raised before the IBLA at all. In any event, the issues raised by petitioner essentially ask this Court to reweigh the evidence and redetermine questions of fact that were considered and correctly resolved by the appropriate agency.

1. a. There can be no doubt that the court of appeals and the district court correctly held that the IBLA did not abuse its discretion in affirming the Hearing Officer's decision on the Sullivan claims. The only objection made by Sullivan to the IBLA was that his representation by a non-lawyer in the administrative hearing violated his right to procedural due process. This argument plainly was without merit. The Department of the Interior's regulations allowed Sullivan to be represented by counsel (see Pet. App. 29, 44), and, indeed, the Department specifically pointed out to Sullivan that he was not being represented by counsel (see *id.* at 34-36). Once Sullivan knowingly declined to be represented by counsel, he could not later be heard to complain of a due process violation. Cf. *Goldberg v. Kelly*, 397 U.S. 254, 270 (1970) ("We do not say that counsel must be provided at the pre-termination hearing, but only that the recipient must be allowed to retain an attorney if he so desires"). Indeed, petitioner himself does not appear to maintain this argument in his petition.

b. There is similarly no merit to petitioner's contention (Pet. 20-36) that the court of appeals should have reconsidered *de novo* the Hearing Officer's fact-bound conclusion concerning the marketability of the sand and gravel on the Charleston 24/39 claims. In acquiring the Charleston 24/39 claims from Sullivan in 1979, petitioner acquired two claims that had been adjudicated by

the IBLA to be null and void. Petitioner could acquire no greater interest in the claims than his grantor, who had elected not to appeal the IBLA's decision, had to give. He had no right as a bona fide purchaser to challenge anew the IBLA's earlier determination that the claims were invalid.¹ Moreover, both the federal Anti-Assignment Act, 31 U.S.C. 3727, and the six-year statute of limitations in 28 U.S.C. 2401(a) suggest that petitioner cannot be allowed to seek judicial review of the IBLA's decision at this late date.² Finally, the contention that the Hearing Officer's decision was not supported by substantial evidence was not raised before the IBLA and thus, under well established principles of review of agency action, should not even be considered by the courts. See *United States v. L.A. Tucker Truck Lines, Inc.*, 344 U.S. 33, 37 (1952).

In any event, substantial evidence supports the decision of the Hearing Officer. Petitioner asserts (Pet. 27) that Sullivan's testimony as to pre-1955 sales from the Charleston 24/39 claims was "unrebutted" and suggests that the opinion of the government's expert witness should have been disregarded (Pet. 27-28, 31). But deci-

¹ As the district court noted (Pet. App. 53-55), petitioner is deemed under Nevada's recording laws to have acquired these claims with notice that they had been adjudicated null and void. See Nev. Rev. Stat. §§ 111.320, 247.190 (1967); *All American Van & Storage v. Deluca Realty, Inc.*, 95 Nev. 253, 592 P.2d 951 (1979); *White v. Moore*, 84 Nev. 708, 448 P.2d 35, 36 (1968).

² See, e.g., *Naartex Consulting Corp. v. Watt*, 542 F. Supp. 1196, 1204 (D.D.C. 1982) (Anti-Assignment Act designed "to prevent persons with the means and disposition from buying up claims against the government and thereby proliferating suits against the government"); *Crown Coat Front Co. v. United States*, 386 U.S. 503, 510-511 (1967) (right of action to review administrative decision accrues, for statute of limitations purposes, at time of final administrative action). In light of its disposition of the case on other grounds, the court of appeals did not address these two issues.

sions by the administrative factfinder based on credibility determinations should not be upset by a reviewing court except when made irrationally. See, *e.g.*, *D.C. Transit System, Inc. v. Washington Metropolitan Area Transit Commission*, 466 F.2d 394, 404 (D.C. Cir.), cert. denied, 409 U.S. 1086 (1972). The testimony of the government's witness provided ample basis for the decision of the hearing officer, and that decision should not be disturbed by a reviewing court. Moreover, Sullivan's testimony regarding his pre-1955 sand and gravel sales was not un rebutted. The Hearing Officer concluded (Pet. App. 21) that the testimony of the government's expert witness and an aerial photograph "establish[ed] a *prima facie* case that there was no production or sale of sand or gravel from [the] Charleston 24/39 [claims] * * *." The Hearing Officer further suggested (Pet. App. 23) that the government's *prima facie* case could readily withstand a response comprised of "infirm or inconsistent recollection rather than adequate records or other reliable means of proof."

Petitioner suggests (Pet. 16-17) that the court of appeals' decision as to his two claims conflicts with the court of appeals' factual determination regarding other Charleston-tract claims in *Charlestone Stone Products Co. v. Andrus*, 553 F.2d 1209 (9th Cir. 1977), rev'd on other grounds, 436 U.S. 604 (1978). This is incorrect. Unlike the detailed factual presentation of marketability made by the claimant in *Charlestone Stone Products* (see 553 F.2d at 1211-1213), Sullivan's evidence of marketability as to the Charleston 24/39 claims was quite meager; it consisted largely of his own "very general" descriptions and four unsworn statements (see Pet. App. 11, 13, 16). Indeed, the Hearing Officer in the *Charlestone Stone Products* case specifically observed (Pet. App. 17) that evidence of pre-1955 mining activity on some of the other Charleston claims did *not* extend

to portions of the Charleston 24/39 claims.³ Thus, there is no inconsistency at all in the different results with respect to the different claims in the Charleston tract.

2. Petitioner also appears to argue (Pet. 25, 27, 29, 32-35) that the court of appeals incorrectly applied a test focusing on the marketability of the sand and gravel as of July 23, 1955, and instead should have examined the claimant's present "good faith." This argument is without foundation. This Court specifically endorsed the "marketability" test in *United States v. Coleman*, 390 U.S. 599, 602-604 (1968), stating that "the marketability test is an admirable effort to identify with greater precision *and objectivity* the factors relevant to a determination that a mineral deposit is 'valuable'" (*id.* at 602 (emphasis added)). By the same token, it is well established that petitioner's focus on his own investments in the mining sites after 1955 is quite irrelevant in light of the statutory cut-off in the Common Varieties Act. As the court of appeals stated in *Rawls v. United States*, 566 F.2d 1373, 1376 (9th Cir. 1978), "[b]ecause a claimant must have made a valuable discovery prior to the critical date, events thereafter are not pertinent to the inquiry." To the extent petitioner objects on policy grounds to the leasing scheme that now controls post-1955 discoveries of sand and

³ The Hearing Officer stated (Pet. App. 17):

"There was no active operation on any of the remaining claims on July 23, 1955, [the reference is to all claims involved other than Charleston Nos. 9 and 10, and includes the overlapping 11 and 13A portions of Charleston 24/39] and the occasional utilization of material from these claims prior to and after that date was not connected with the Brawner operation. Also there was no probative evidence that the deposit on any of these latter claims could have been operated profitably in competition with the many other potential deposits in the Las Vegas Valley on the critical date. . . ."

gravel (see Pet. 32-35), those objections should be addressed to Congress, not to this Court.

3. Petitioner asserts (Pet. 37-48) that his property has been taken unlawfully, in violation of the Due Process Clause, apparently on the theory that the courts should have considered his factual claim of marketability on a de novo basis. This assertion, raised for the first time here, is difficult to understand. The contention that the Charleston 24/39 claims were valid was given a full hearing by the agency (with opportunity for judicial review) in the *Sullivan* case. The claims were adjudicated null and void, and petitioner purchased them with notice of their status. He has no property right in them to which he can now attach a constitutional claim. As this Court stated in *Best v. Humboldt Placer Mining Co.*, 371 U.S. 334, 337 (1963) (quoting *Cameron v. United States*, 252 U.S. 450, 460 (1920)), "no right arises from an invalid claim of any kind."

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

REX E. LEE

Solicitor General

F. HENRY HABICHT, II

Assistant Attorney General

ROBERT L. KLARQUIST

DONALD T. HORNSTEIN

Attorneys

JANUARY 1985

FILED
JAN 10 1985

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Supreme Court, U.S.
FILED

JAN 10 1985

ALEXANDER L. STEVAS
CLERK

Number 84-718

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1984

Robert L. Mendenhall, Petitioner,

vs.

The United States of America,
The United States Department of the
Interior, and Cecil D. Andrus,
Secretary of the Interior and
Edward F. Spang, State Director of the
Nevada Office of the Bureau
of Land Management, Respondent.

[REDACTED]

Motion for leave to File Amicus Curiae

Brief Amicus Curiae of Wayne Winters,
editor and publisher
Western Prospector and Miner

William S. Andrews
Counsel for the
Western Prospector and Miner
1432 N. 7th Street
Phoenix, Arizona 85006
(602) 254-5051

27

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An Appeal from the U.S. Court of Appeals
9th Circuit

MOTION FOR LEAVE TO FILE AS AMICUS CURIAE

COMES NOW, Wayne Winters, by and
through his attorney William S. Andrews,
and moves that the Court grant permission
to file an amicus curiae brief to the
Western Prospector and Miner in support of
the petition for writ of certiorari in
Mendenhall v. U.S..



Nature of Applicant's Interest

The Western Prospector and Miner (WPM) is a monthly periodical with readership throughout the United States and abroad. Its editor, Wayne Winters, has had a long career editing newspapers primarily concerned with mining: Tombstone Epitaph (1964-1974); Bisbee Review (1974-1976) and Western Prospector and Miner (1975 to present). As editor of the Western Prospector and Miner, Winters has become painfully aware of growing discouragement among the small mining community with officers of the Department of Interior and the U.S. Forest Service.

Petitioner, Robert Mendenhall's, legal battle to secure title to his mining claims has been fought by many of the small miners about whom WPM reports. Despite compliance with the mining laws, however, few have ever won a legal tangle with agents of the U.S. Government and to the best of our



knowledge, no mining claimant has ever been heard by the U.S. Supreme Court in a battle against the Interior Department, except in those rare cases, when the claimant has survived Interior's tribunals to win in a lower court. Interior has invariably appealed such cases to the U.S. Supreme Court. Only then has the mining claimant been heard.

WPM believes that the granting of the petition for writ of certiorari of Robert L. Mendenhall would afford the Court the opportunity to bring about a peaceful solution to a problem which has been growing ever since the passing of the Surface Resources Act of July 23, 1955 and, with the solution, a renewed respect for law.

Facts inadequately set forth by Petitioner

Wayne Winters, editor of the WPM, has chronicled in his newspapers many mining claims which have been invalidated by



Respondent over the years and the vicious misuse of power by agents of the U.S. Forest Service practiced against a class of people who seem to have been forgotten by the justice system. In an affidavit made a part of the amicus curiae brief in the appendix, Winters summarizes the facts of those stories; and in a second appendix document, the most recent developments in the unrest in the community of small miners in northern California are set forth for the court in a copy of an article from the front page of the Western Prospector and Miner for December, 1984.

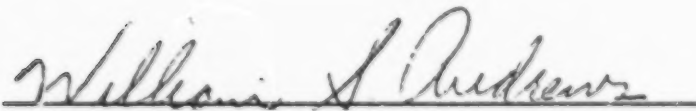
Also in the appendix to the amicus curiae brief are excerpts from a Senate hearing in 1966 which overwhelmingly substantiate that Respondent has willfully misadministered the Surface Resources Act of 1955. The question of the intent of Congress in passing that Act is fully answered and documented by these excerpts.



Questions of Law

Furthermore, the amicus curiae brief calls the court's attention to two important precedent cases not already cited in the Petition for writ of certiorari: Andrus v. Shell Oil Company, 446 U.S. 657, 660 (1980) dealing with the "marketability" test for discovery of a valuable mineral deposit; and Baker v. United States, 613 F.2d 224 (9th Cir. 1980), cert. denied, 449 U.S. 932 (1980) which addresses abuse of discretion by Respondent contrary to existing mining law in the administration of the Surface Resources Act.

Respectfully submitted,



William S. Andrews
Attorney for the
Western Prospector and Miner

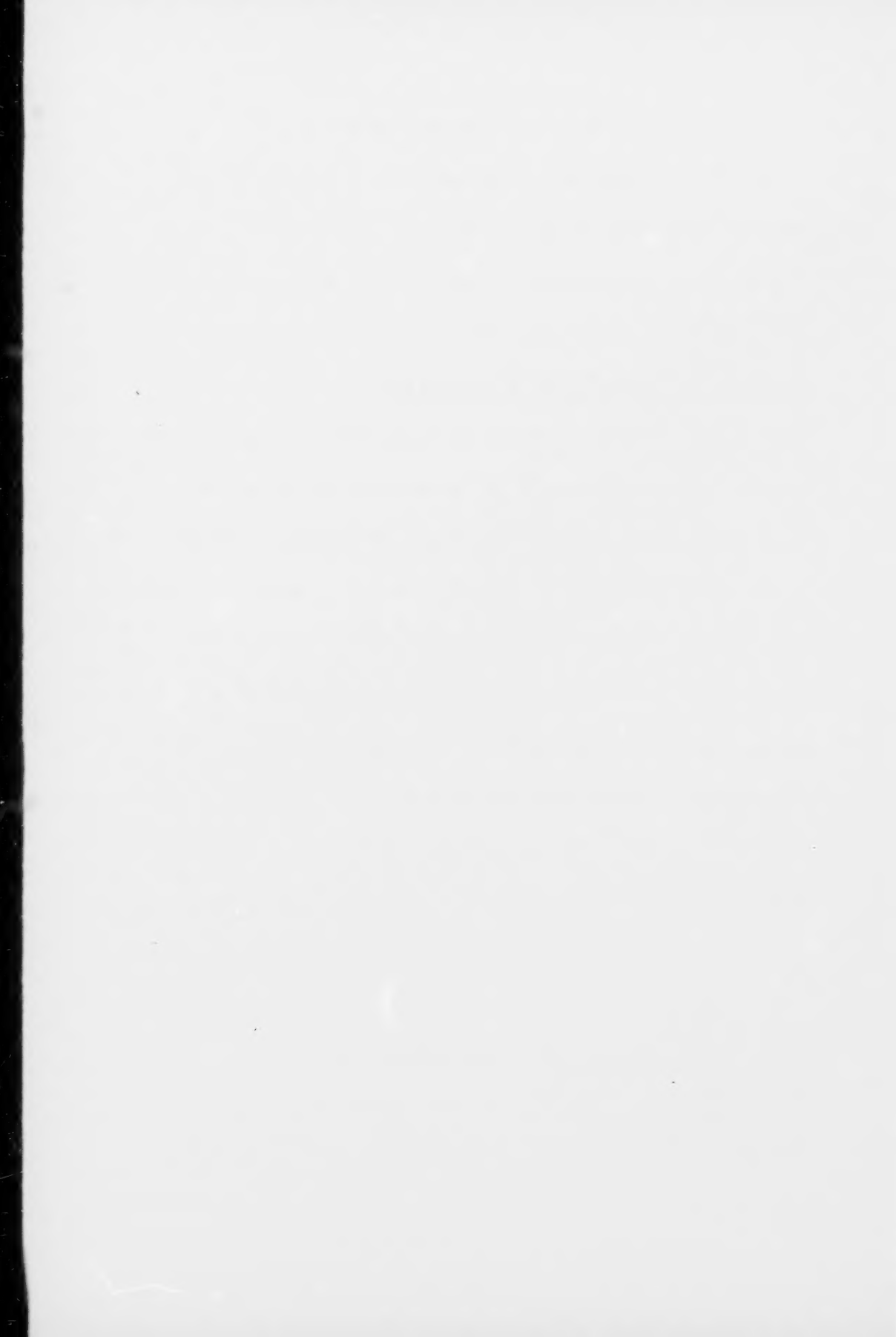


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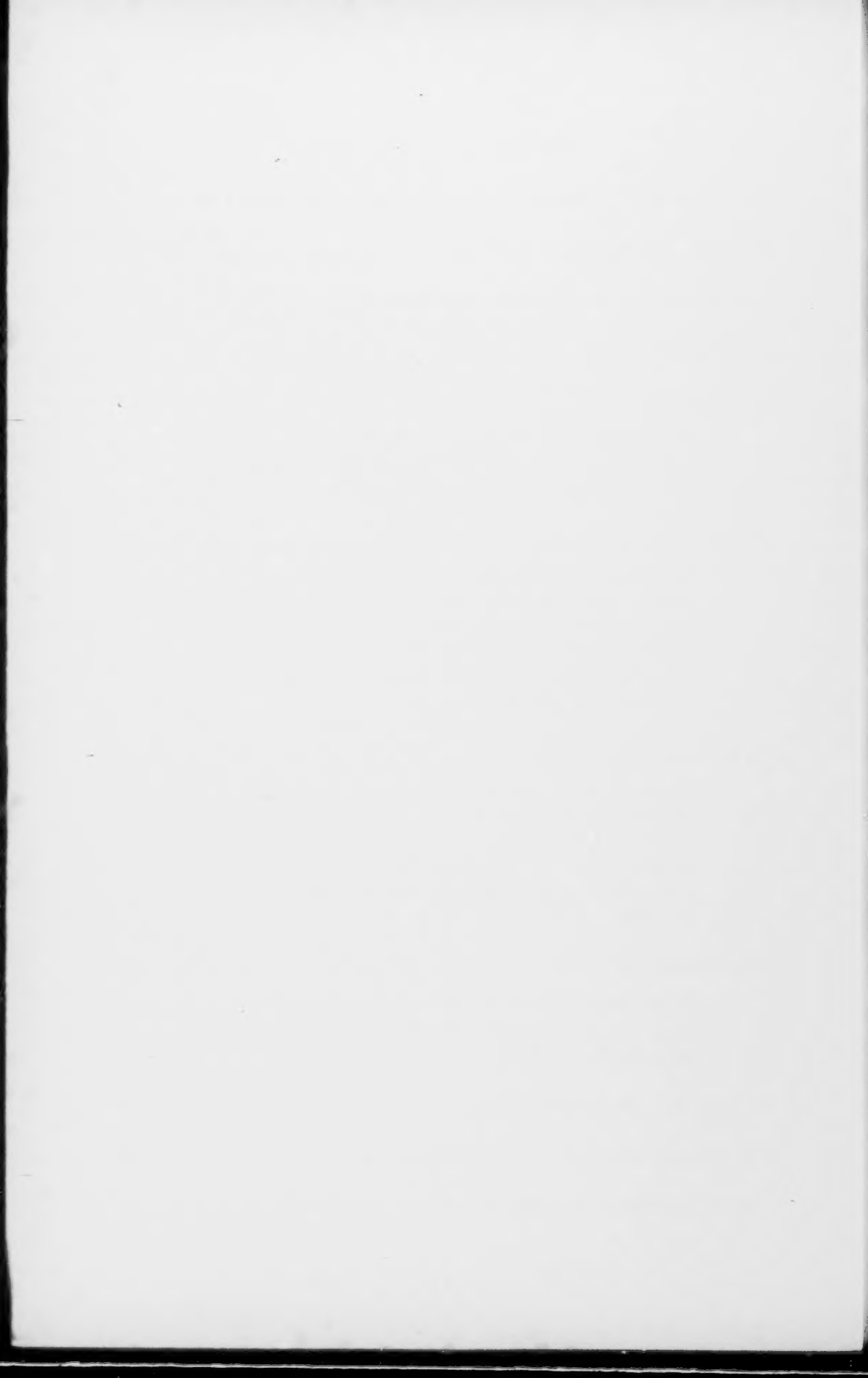


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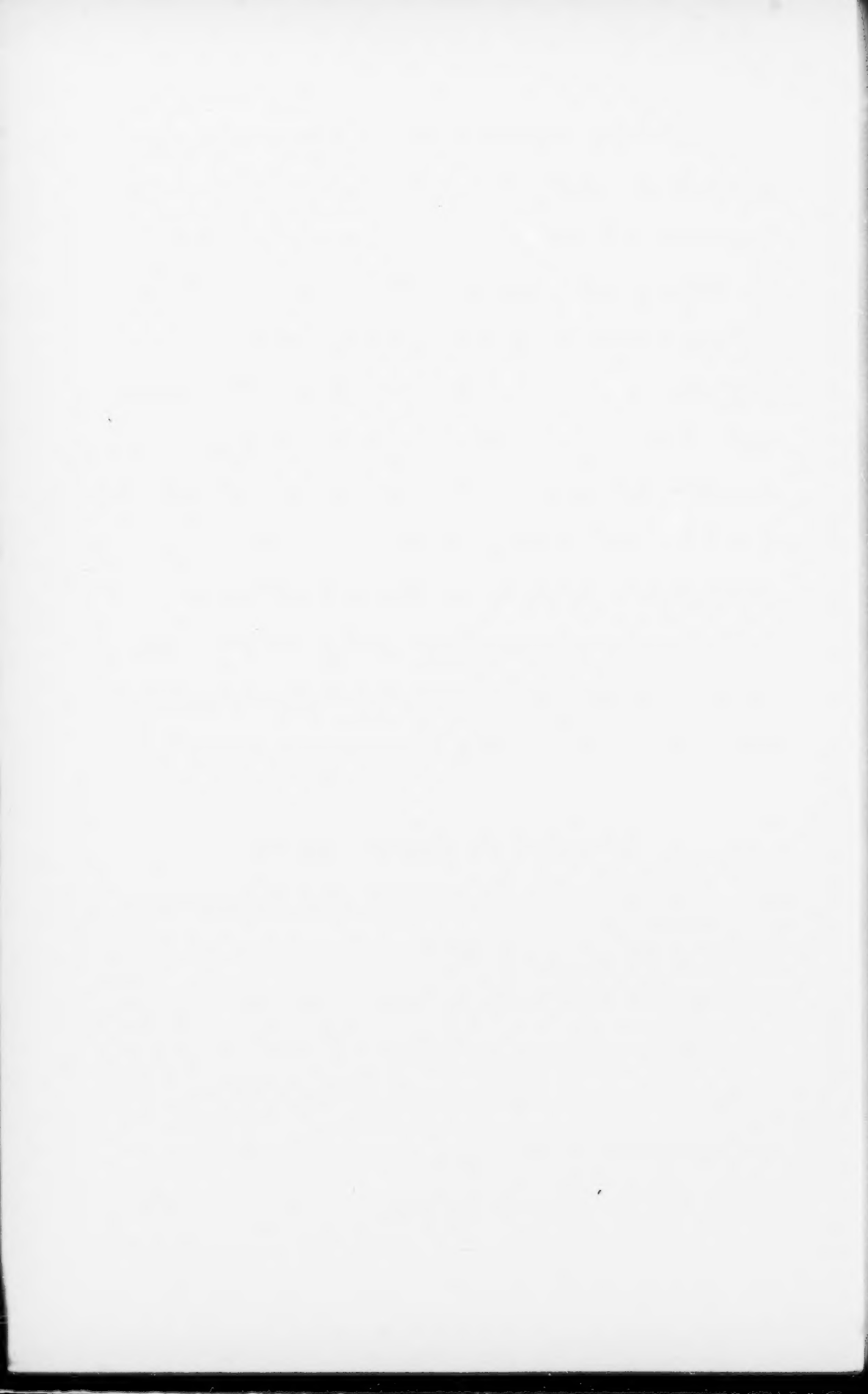
Written consent of the Petitioner to
file this amicus curiae brief was mailed to
the Court on January 8, 1984. Written
request was made on January 4, 1984, to the
Respondent. The written request followed
oral consent to filing the amicus curiae.



Shortly before noon, Arizona time, on January 9, 1985, Wayne Winters called Allen Horowitz of the Solicitor General's Office to inquire whether written consent had been timely filed with the Clerk of the U.S. Supreme Court. Horowitz replied: "Go ahead and file it (the amicus curiae brief). Assume that permission is granted unless you hear definitely from me to the contrary." Wishing to leave nothing to assumption, a motion for leave to file as an amicus curiae without written consent of Respondent has been attached hereto.

INTEREST OF AMICUS CURIAE

The Western Prospector and Miner is a monthly periodical with readership throughout the United States and abroad. Its editor, Wayne Winters, has had a long career editing newspapers primarily concerned with mining: Tombstone Epitaph (1964-1974); Bisbee Review (1974-1976) and



Western Prospector and Miner (1975 to present). As editor of the Western Prospector and Miner, Winters has become painfully aware of growing discouragement among the small mining community with officers of the Department of Interior and the U.S. Forest Service.

Petitioner's legal battle to secure title to his mining claims has been fought by many of the small miners about whom WPM reports. Despite compliance with the mining laws, however, few have ever won a legal tangle with agents of the U.S. Government and to the best of our knowledge, no mining claimant has ever been heard by the U.S. Supreme Court in a battle against the Interior Department, except in those rare cases, when the claimant has survived Interior's tribunals to win in a lower court. Interior has invariably appealed such cases to the U.S. Supreme Court.

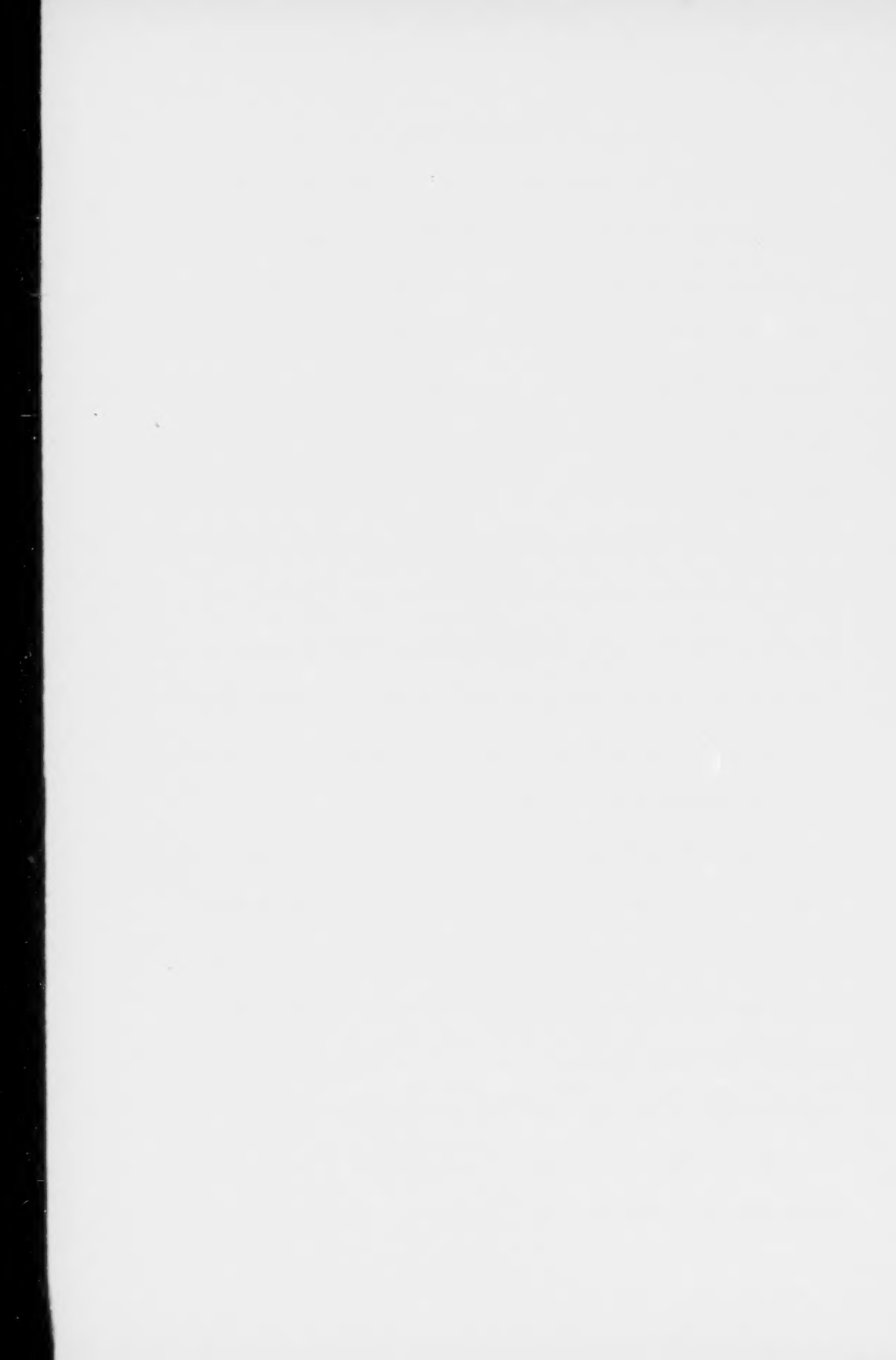


WPM believes that the granting of the petition for writ of certiorari of Robert L. Mendenhall would afford the Court the opportunity to bring about a peaceful solution to a problem which has been growing ever since the passing of the Surface Resources Act of July 23, 1955 and, with the solution, a renewed respect for law. Wayne Winters, editor of the WPM has chronicled in his newspapers many mining claims which have been invalidated by Respondent over the years and a vicious misuse of power by agents of the U.S. Forest Service practiced against a class of people who seem to have been forgotten by the justice system. In an affidavit made a part hereof in the appendix, Winters summarizes the facts of those stories.

INTRODUCTION

Prior to the passing of the Surface Resources Act of 1955, hearings before offices of the Interior Department with regard to mining claims were invariably the result of a dispute between private users. After the Surface Resources Act of 1955, the Forest Service and the Bureau of Land Management became parties at interest in invalidation proceedings set up under the provision for Administrative Procedure (Title 5, Section 500, et seq.). Despite safeguards against arbitrary and capricious use of agency discretion in these quasi-judicial hearings, Respondent has been unable to overcome a conflict of interest in its contests against mining claimants.

Respondent has openly admitted that it believes the stated intent of Congress - to encourage mining on the public lands - is contrary to wise administration. Respondent advocates leasing the nations



minerals.¹ Using the inherent subjectivity and the judgmental imperative involved in the phrase "valuable mineral deposit" from the law entitling mining claims on the public lands, the Respondent has succeeded in nullifying the mining laws.

1. Testimony of Arthur W. Greeley, Associate Chief, Forest Service, Department of Agriculture in "Legislative Purpose of Public Law 167" (30 U.S.C.A. 611). Hearing before the Subcommittee on Minerals, Materials, and Fuels of the Committee on Interior and Insular Affairs, U.S. Senate, 89th Cong., Second Session on S. 2281 and S. 3485, Bills to Amend Section 3 of the Act of July 23, 1955 (69 Stat. 367, 368), June 28, 1966.



ARGUMENT

I. The Common Varieties Act of 1955, 30 U.S.C. § 611, Does Not Apply to Commercially Valuable Deposits

By the term of the Common Varieties Act, "common varieties" which may not be located do not include materials with a "distinct and special value." It is clear that the intent of Congress was to prevent bad faith mining claimants from obtaining land for other purposes than mining under the mining laws and not to prevent the location by bona fide miners of valuable mineral deposits. It is important that the Supreme Court re-affirm this basic principle of the mining laws as Congress has in each and every statute that it has passed effecting public lands open to mineral entry.

Although the intent of Congress clearly was to allow the location of commercially valuable sand, rock, gravel

and cinders, etc., the statute has been repeatedly misconstrued by the Department of Interior which has disallowed the location of obviously valuable mineral deposits.

In addition, the circuit courts have not been precise in their definition of common varieties. See, e.g., Brubaker v. Morton, 500 F.2d 200 (9th Cir. 1974), McClarty v. Secretary of the Interior, 408 F.2d 907 (9th Cir. 1969), and Boyle v. Morton, 519 F.2d 551 (9th Cir. 1975). cert. denied, 423 U.S. 1033 (1975).

II. Because the Surface Resources Act Does Not Apply to Commercially Valuable Deposits the Test for Discovery Must be Made by Looking At Present Conditions and Not Those in 1955

When Congress passed the Common Varieties Act it intended only to prevent the location of deposits of sand, stone, gravel, cinders, etc., that were common,



i.e., not commercially valuable, and Congress in no way intended to preclude the future location of commercially valuable, deposits of these materials. Because the location of such deposits is permissible today, any challenge to the validity of a discovery should look to the present value of the deposit rather than those conditions that may have existed in 1955. In the case of the Mendenhall deposit at issue, it is clear that because this was an active producer when the invalidation proceedings commenced, all of the tests for discovery clearly have been met.

III. Even If a Showing of a Valuable Mineral Deposit in 1955 Was Relevant the Department Erred in Misapplying the Supreme Court's Test for Mineral Validity Determinations

In 1905 the United States Supreme Court approved the Department of Interior's "prudent-man test" under which discovery of a "valuable mineral deposit" requires proof

of a deposit of such character that a "person of ordinary prudence would be justified in the further expenditure of his labor and means with the reasonable prospect of success, in developing a valuable mine." Chrisman v. Miller, 197 U.S. 313 (1905). In United States v. Coleman, 390 U.S. 599 (1968); the court approved the department's marketability test--whether a mineral can be extracted, removed and marketed at a profit--determining it to be a logical complement of the prudent man standard. See also, Andrus v. Shell Oil Company, 446 U.S. 657, 660 n.4 (1980).

Unfortunately, the department's application of the marketability test has been anything but a "complement" of the prudent man rule. Where the marketability test, as approved by the Supreme Court, was intended to be a flexible evidentiary standard, the department has instead used

it as a rigid and singular test of validity in circumstances where that test is neither appropriate nor logical.

As stated in Coleman, the marketability test was designed only to throw light on a prospector's intent and only to determine a prudent man could reasonably believe that a profitable mine could be put in production and not whether a presently profitable mine existed. In looking at the "market" the department has totally ignored a crucial factor in all market determinations: A market depends not only upon present conditions, but also upon whether those conditions can be developed. In other words, in applying the marketability test the department has totally ignored the reasonable ability of mineral operators to develop a market for a valuable product.

That present marketability is not a sine qua non of all mineral discoveries was shown in Andrus v. Shell Oil, 446 U.S. at



663 n.6, where the court reasoned that under the Mineral Leasing Act Congress did not consider "present marketability" a prerequisite to the patentability of oil shale.

In any event, the marketability test as applied in Coleman is not necessarily the same marketability test that should be applied in this case. Coleman involved a patent proceeding. If the claims in Coleman had been shown to be valuable then the government would have forever lost all fee title to the claims. Such circumstances warrant a strict test of mineral value. However, in this case the claim invalidation proceedings are not in response to a patent application. Rather they are based upon a determination by the department that the department would prefer the claims to be invalid.

Indeed, in this case, there are no allegations of any higher or better use of



the land in question. For this reason the marketability test, if applied at all, should be liberally construed in order to fully comport with the intent of Congress in the Mining Law of 1872. Specifically, the mineral claimant should be permitted to have an opportunity to fully delineate the nature of his mineral discovery. With the strict application of the marketability test to a location, the department precludes the ability of a claimant to develop a prospect that may only be marginally marketable into one that is highly marketable.

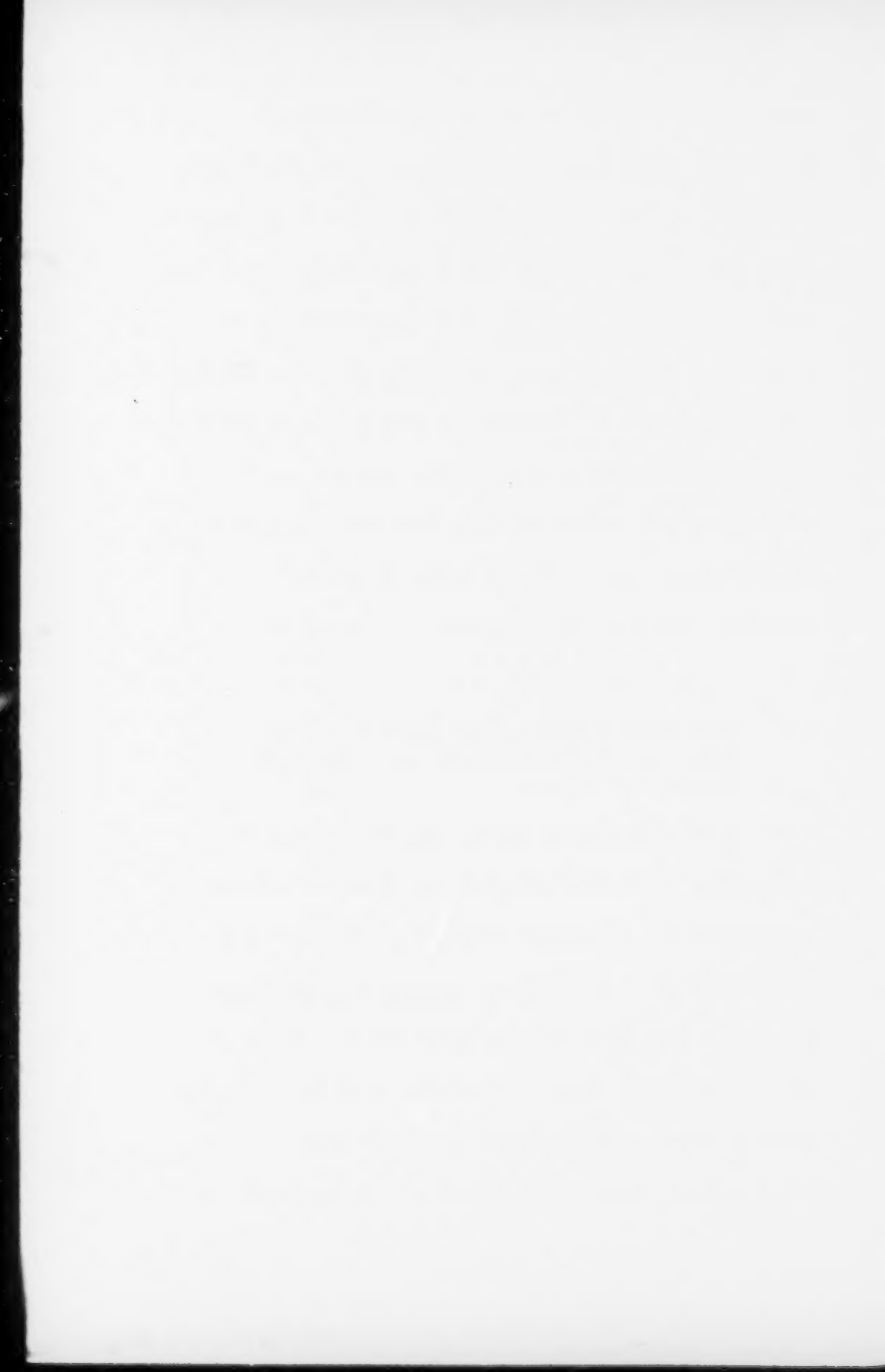
For court decisions that have considered the flexibility of the construction of the marketability rule see Converse v. Udall, 399 F.2d 616 (9th Cir. 1968), cert. denied, 303 U.S. 1025 (1969); Barton V Morton, 498 F. 2d 288 (9th Cir.1974) (after discovery of mineral deposit the claimant need only show a reasonable prospect that a



profitable mine will be developed); Multiple Use Inc. v. Morton, 353 F. Supp. 184 (D. Ariz. 1972), aff'd, 504 F.2d 448 (9th Cir. 1974) (it need not be proved that the claim can in fact be operated at a profit); Melluzzo v. Morton, 534 F. 2d 860 (9th Cir. 1976) (lack or insubstantiality of sales of material from claims in question if relevant to the question of marketability. It is not, however, conclusive proof of lack of value.)

IV. The Department Has Incorrectly Applied A "Too Much" or "Excess Reserves" Test

A valuable mineral deposit may not be declared invalid simply because a great quantity of mineral reserves cannot be marketed all at once. Baker v. United States, 613 F. 2d 224 (9th Cir. 1980), cert. denied, 449 U.S. 932 (1980). It is clear from the transcripts of the department hearings that the presence of



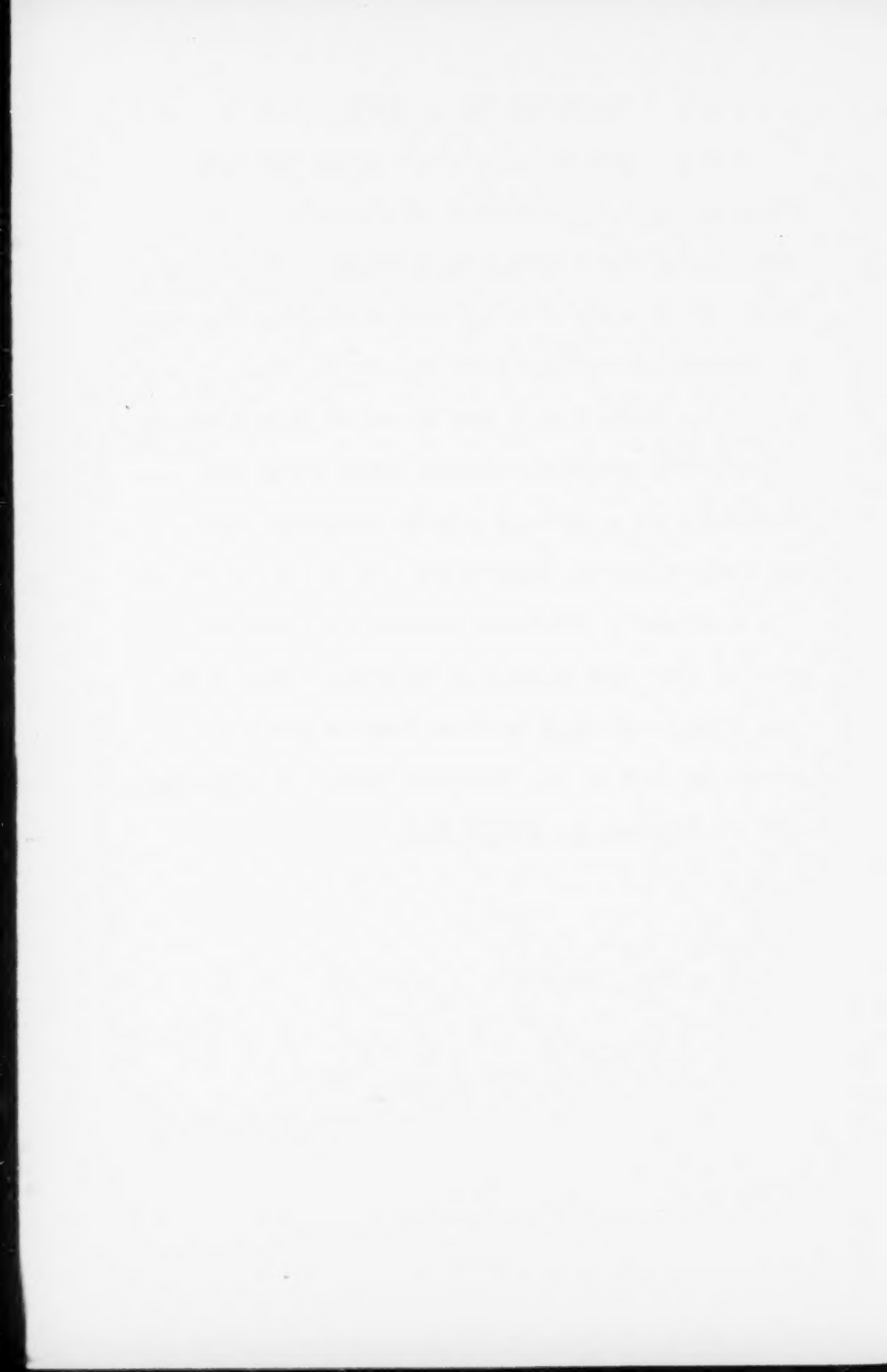
other valuable reserves of similar, but not identical, deposits was a conclusive factor in finding the Mendenhall claims invalid.

It should be noted that the deposits in this case clearly could be marketed in the foreseeable future and that the opposition to the denial of ceriorari in Baker by Justice Blackmun with Justices Marshall and Powell is not at issue in this case.



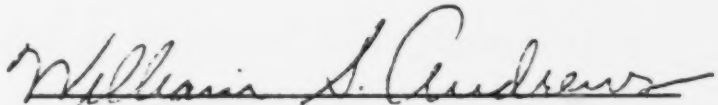
SUMMARY OF ARGUMENT

The Department of the Interior has gone against the intent of Congress in administering the Surface Resources Act of 1955, 30 U.S.C. § 611. By applying the Act to valuable deposits of mineral, the Interior Department has created a miasma of irrelevant considerations regarding the validity of a mining claim--regulations applied without regard to the good faith of the claimant; without regard for present market for the mineral; without regard for the limits placed on the "marketability test" by the U. S. Supreme Court in Coleman and in Andrus v. Shell Oil.



CONCLUSION

The need for the U.S. Supreme Court to consider the issues in Mendenhall v. U.S. has attained to urgency. The court must affirm that (1) "common varieties," when claimant is, in good faith, developing a mineral deposit, are locatable under the mining laws and (2) the "marketability" test as used by Respondent is wholly outside the mining laws and unnecessary to their administration. The petition for writ of certiorari must be granted if law is to govern the public lands.

A handwritten signature in cursive script, reading "William S. Andrews", written over a horizontal line.

William S. Andrews

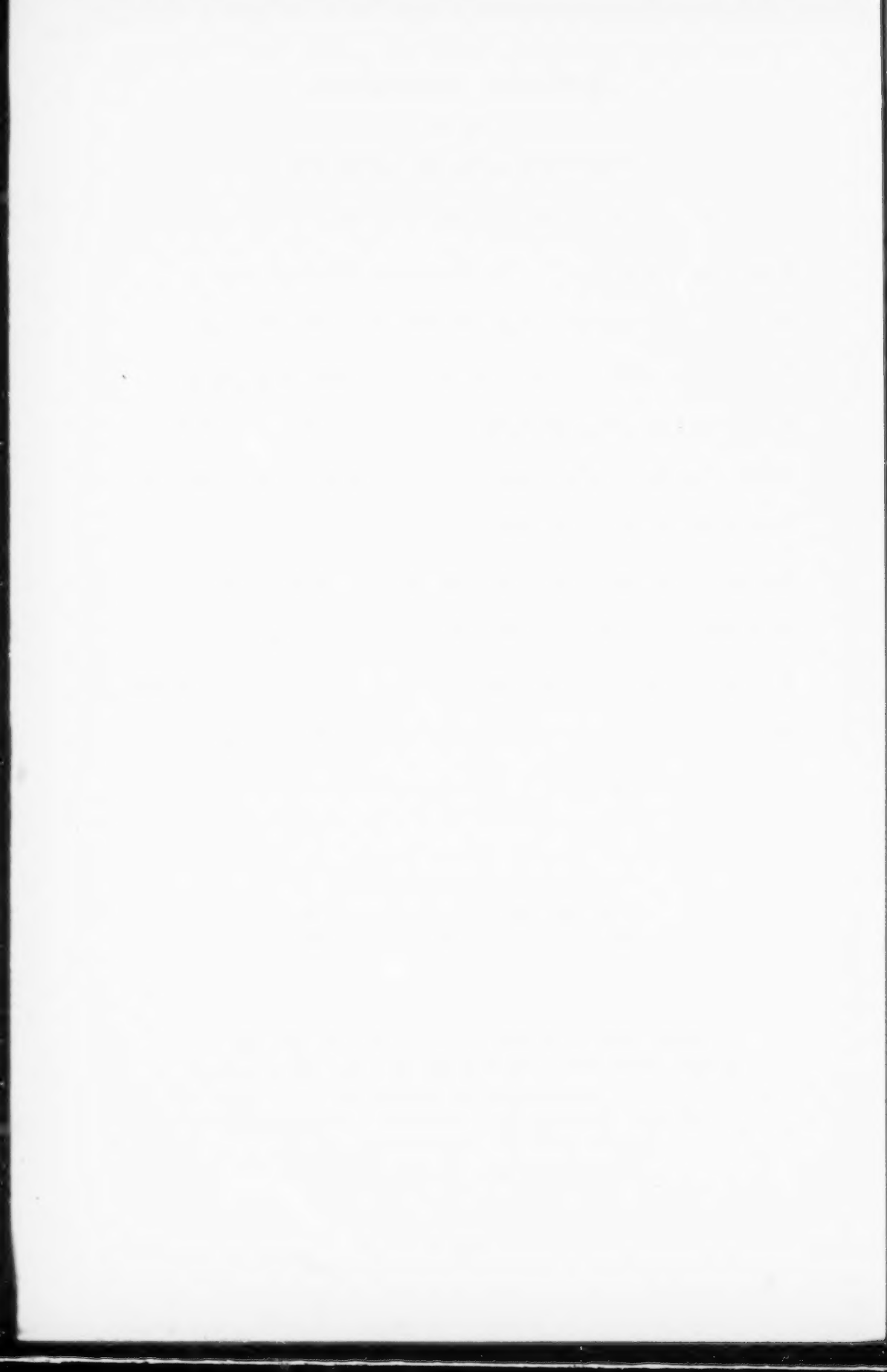
ENTRY OF APPEARANCE
and
CERTIFICATE OF SERVICE

I cerify that I am a member of the Supreme Court of the United States Bar; that I am appearing on behalf of Wayne Winters, editor-in-chief of the Western Prospector and Miner, in this matter and that forty (40) copies have been mailed to the Court and three (3) copies of the foregoing Amicus Curiae Brief have been served upon all appropriate parties by depositing the documents in a United States Post Office, first-class postage prepaid, this 11th day of January, 1985, addressed to:

Solicitor General
Department of Justice
Washington, D.C. 20530

and

The Department of the Interior
Land and Natural Resources Division
Appellate Section
Attn: Wendy B. Jacobs, Attorney
18th and C. Streets, N.W.
Washington, D.C. 20240



William S. Andrews

William S. Andrews
Attorney for Amicus Curiae
1432 N. Seventh St.
Phoenix, Arizona 85006

STATE OF ARIZONA)
) ss.
County of Maricopa)

On this 10 day of January, 1985,
personally appeared before me, the
undersigned officer, William S. Andrews,
who acknowledged the above instrument.

Notary Public

My Commission Expires: 12-28-85

PEITION FILED
JAN 10 1985

(7)

Supreme Court, U.S.
FILED

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ALEXANDER L. STEVAS
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Edward F. Spang, State Director of the
Nevada Office of the Bureau
of Land Management, Respondent.**

**Appendix to Brief Amicus Curiae of
Wayne Winters, editor and publisher
Western Prospector and Miner**

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Abstracts from: Hearing before
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Senate, Eighty-Ninth Congress,
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Appendix I

WAYNE WINTERS CHRONICLE
OF
INVALIDATION PROCEEDINGS
AGAINST OVER 5000 CLAIMS
AND THE
RESULTING LOSS OF LIVES AND DEMORALIZATION
OF
WESTERN GOLD MINERS

Wayne Winters being first duly sworn deposes and says that the following notes came from the files of the Tombstone Epitath and the Western Prospector and Miner. The stories below are true and factual to the best of my knowledge as a professional journalist.

In the period between Sept. 23, 1970 and March 31, 1976, the Federal Government through the Forest Service and the BLM brought validity contests against 4,770 mining claims in 160 separate contest actions. The small miner on the public



lands has been the chief victim of this sweep by the BLM and the Forest Service. No contest involved claims held by major-- or even large, mining firms. Most of the contests were not defended, due in main by the inability of individuals to afford the expense of legal counsel.

Denny Mining District, California

In September of 1976 Forest Service mineral examiners, backed by Deputy U.S. Marshals and a Forest Service team of between 10 and 16 heavily armed men carrying automatic weapons and sawed-off shotguns, conducted a "mineral examination" a day for 18 days on unpatented mining claims in the Denny, California mining district.

The Upgrade unpatented mining claim is located at Denny, in northern California. It has been owned since 1975 by Lynn A. Weber. His son-in-law David Jones and wife



Veronica lived in a small cabin on the property. Jones supported them by dredging gold on the claim in 1980 and 1981.

A "mineral examination" was made by Forest Service employees on the Upgrade property in 1978. The examiner's report stated that he only recovered eight cents worth of gold per cubic yard of material processed. The claim was declared invalid for lack of discovery.

Independent experts familiar with the Upgrade Claim stated that they calculate there are 51,000 yards of gravel on the property that will run \$9.00 per cubic yard and that in excess of \$450,000 in gold can reasonably be expected to be recovered from the claim.

On December 14, 1981 Dave Jones, his wife and their two-month-old son, Noah Jeremiah, were living in the little cabin on the claim. The weather was very cold and as is customary in the district, mining



was shut down until the return of warm weather in the Spring.

That day 14 men led by Big Bar District Ranger David Wright arrived at the Upgrade Claim and gave Jones and his family 15 minutes to remove their belongings. Not only did this team of Government employees armed with high-powered rifles and sawed-off shotguns destroy the family's shelter, but they sought out the suction dredge, sprinkled an inflammable liquid over it, and set it afire.

Jones was known among his fellow miners as a clean, honest, hard-worker who had no troubles with the law enforcement people and who supported his family by mining gold on the Upgrade Claim. He received no assistance from food stamps or other welfare sources.



Ruth Matapan gold placer

In civil action #S-80 593 MLS, U.S. Court of Appeals for 9th Circuit, Mineral Examiner (Forest Service) Emmett Ball failed to notify mining claimant Jim Sette of his intention to conduct a sampling for mineral validity on the Ruth Matapan claim. The examiner with two Forest Service employees, Harry Frey and Tom Neenan, entered the claim with no witnesses present to represent the owner, and took five pounds of material as a sample of the mineral contained within the boundaries of this claim. The Forest Service had this sample assayed, and decided that the claim did not contain enough values to constitute a discovery of valuable mineral.

At a recent mining claim hearing at Redding, California, relative to a contested claim held by Dave McMullen, Forest Service mineral examiner Ball testified under oath that he could go out on a 20-



acre mining claim, "eyeball" it and tell if there is any gold on the property; so the fact that Ball needed any sample at all to invalidate the Ruth Matapan claim is noteworthy.

Earlier the Forest Service had agreed to issue a patent to the claim. A Forest Service appraisal report states, "Between the years of 1933 and 1935 approximately \$12,000 worth of mineral was removed from this claim." This would amount to 343 ounces at the \$35 per ounce figure, or \$120,050 at today's \$350 price.

Nevertheless, Ball reported that he failed to find mineral of sufficient value for a prudent man to pursue.

Plumas National Forest, California

The Charlotte-Butch-Dogwood Placer Mining Claim on the Middle Fork of the Feather River 15 miles from Quincy, California, had been owned and mined by

Bill Jacks for 30 years when it was contested by the Forest Service in 1976.

Forest Service mining engineer Henry W. Jones of Quincy testified in a 1976 contest hearing that the claim was invalid due to lack of a discovery. Gerald E. Gould, regional mining engineer for the Forest Service said, "We've taken action against 20 or 25 such claims--there must be a hundred or more like them--since 1968. There are more (actions) to come."

Santa Cruz County, Arizona

On February 15, 1968, during the hearing in the contest of the Oro Escondido unpatented mining claim owned by myself, Wayne Winters, Vern Bernard Molander testified that on October 28, 1965 he and his son were hunting deer in the area. They saw black smoke rising from behind a hill and thinking that perhaps a motor vehicle had overturned and persons might be in need of aid, they proceeded toward it.



Before reaching the site from which the smoke was coming they met a Forest Service pickup truck carrying two young men in Forest Service uniforms. They asked the Forest Service employees if they had seen the smoke and they were told, "Yes. We just set fire to the trailers up there. We put kerosene on them."

The trailers were private property and were located on the Pittsburg patented mining claim, a property owned by Mrs. Edward Shehee of Nogales, Ariz. who also owned a number of unpatented claims in the same area.

The day after this testimony came out at the hearing a representative of the Forest Service went to Nogales and obtained from Mrs. Shehee what the Forest Service called "post permission" to burn the two trailers that they had torched 17 months earlier. It is significant that Mrs. Shehee wanted to continue to hold her



unpatented claims, and the Forest Service was in a position to bring a validity contest against them if she did not agree to give the "post permission" for arson against her property.

I, myself, located a placer claim, the Oro Escondido, on October 13, 1962, in an area that has produced placer gold over a period of 100 years, with the miners employing crude and mainly unmechanized methods. I recovered a substantial amount of gold from the gravels which I mined on the 10-acre claim between 1961 and 1965.

In order to have shelter from the elements and a place to keep my tools, I made bricks of adobe mud and erected a small 12 by 20-foot one-room cabin on the claim. I spent approximately one-third of my time staying and working on the claim (three days each week) in an attempt to develop it into a viable, financially sound mining property, during these years.



The claim was in an extremely remote area. It was about one and one half miles north of the Arizona-Sonora border. The final ten miles of road to it was strictly 4-wheel driving country. I laboriously hauled in supplies and equipment and developed sources of water to process my gold gravels. I employed numerous methods of extracting the gold values from the gravels, developing some methods that are currently being used in many gold producing areas of the world.

On May 2 and 3, 1967, two Forest Service "mineral examiners", Roland Tragitt and Gilbert Mathews, accompanied by a very large ex-professional football player in the employ of the Forest Service and bearing the title of "mineral guard" conducted an "examination" of the claim. They dug some gravel and ran it through a rocker, later panning the concentrates.

In every sample which they took (although they never went to bedrock where the greatest concentration of gold is found) they recovered gold. Still, the Bureau of Land Management contested the claim as (1) having no valid discovery, and (2) being non-mineral in character. The case was held before Hearing Examiner Paul Shepard in Tucson on February 15 and 16, 1968.

I testified that I had recovered gold from the claim and that I believed it had the makings of a profitable mine. Experienced placer miners Tom Anderson, Harry Crowder and Ernest Escapule testified on behalf of the mineral deposit as well, saying that they believed the property had merit and that they would locate and pursue such a claim.

Forest Service employees Tragitt and Mathews testified as to their sampling procedures and the results. They said the



claim was not sufficiently rich in gold to be valid. They also testified that they sampled to bedrock. Hearing Examiner Shepard ruled that the claim was invalid.

I appealed to the Director of the BLM. My appeal was dismissed. I relocated approximately the same ground under the name of Doran's Folly. The Forest Service countered with trespass charges in a civil suit to collect rental and damages. The matter went to an initial hearing in Federal District Court but was then postponed.

I continued in possession of the claim, producing gold from it until 1976 at which time I shut down operations and abandoned the property as part of an agreement with the Forest Service that called for that agency to withdraw their suit for damages against me. I filed a charge of perjury against Forest Service employees Tragitt and Mathews, complaining

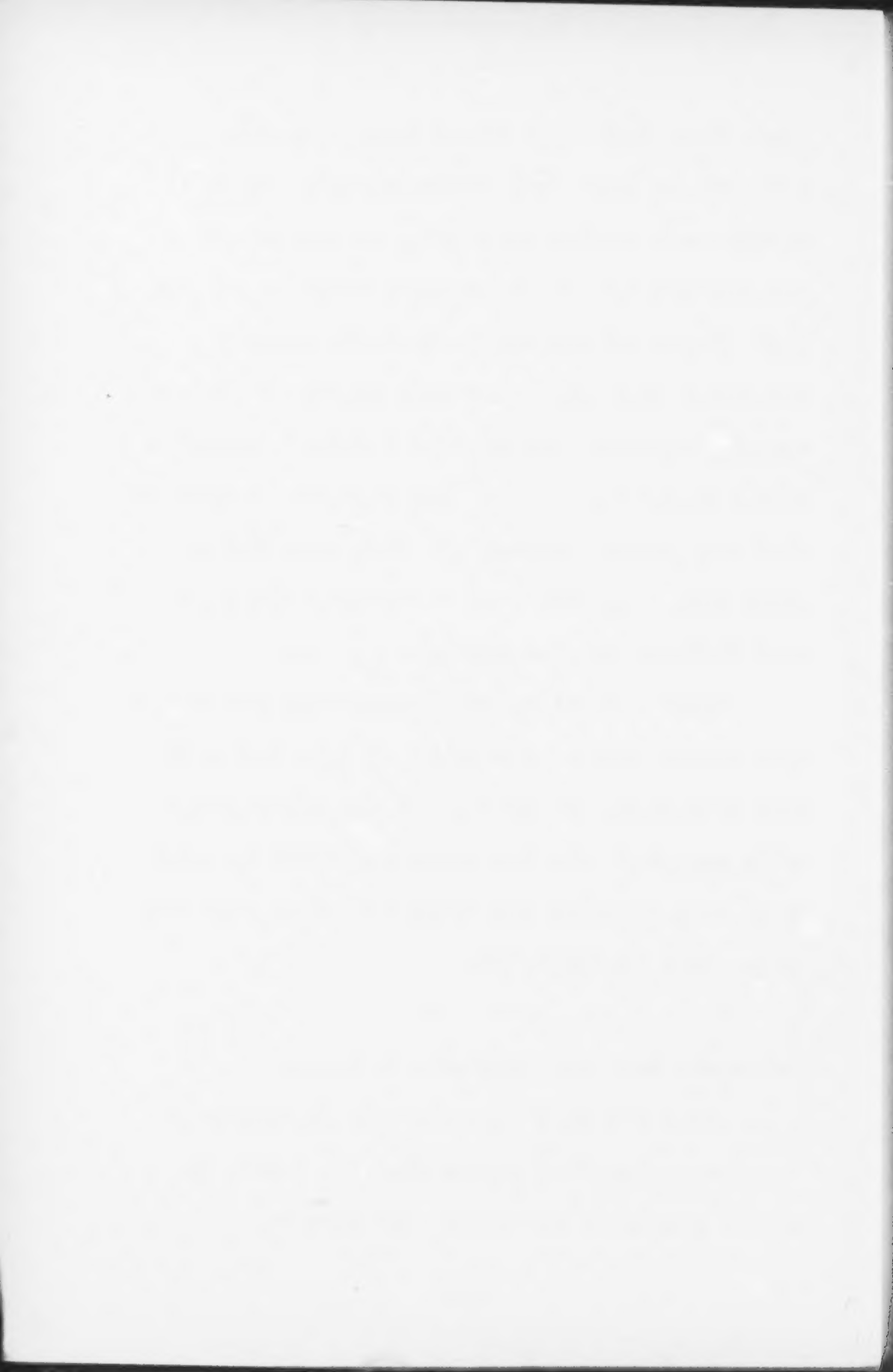


that they had lied about sampling to bedrock in the 1967 examination. This charge was investigated by an operative of the Office of the Inspector General of the U.S. Dept. of Agriculture. Although evidence and testimony was presented by an expert witness (Ariz. State Mine Inspector Verne McCutchan) that the mineral examiners did not reach bedrock as they had sworn they did, the OIG report cleared Tragitt and Mathews of the charge.

When I finally abandoned the claim, it was immediately relocated by another miner who continues to hold this valuable property against the day when he feels he can mine and receive the highest price for the gold that it contains.

Coronado National Forest, Arizona

Earl Francis located the Triangle Dot unpatented mining claim May 25, 1963, a short distance southeast of Oracle,



Arizona. He recorded the claim in the Pinal County Courthouse June 3, 1963. The quartz vein on which he made his discovery contained values in gold and silver.

Five months after Francis made the location--on October 28, 1963, Forest Supervisor Clyde W. Doran requested that a mineral examination of the claim be made. On December 5, 1963, Assistant Regional Forester Zane G. Smith notified Doran that Forest Service Mineral Examiner Jack Pardee had been assigned to make the examination and a report on his findings. Pardee conducted the examination on October 14, 15, 22 and 23, 1964. D.D. Cutler (for Zane G. Smith) apparently received Pardee's report on Nov. 12, 1964.

On Dec. 21, 1964, Richard L. Fowler, then attorney in charge for the Southwest Region U.S. Forest Service, took over the case. A BLM hearing examiner heard the contest in July of 1965.



Francis, a man of 35, requested permission from the Forest Service to string a power line from a nearby ranch to furnish electricity to power an ore crusher. Refused, he obtained and dragged up the mountain a gasoline-powered generator to help develop and work his mine. He also requested permission to put in a road. This was also refused so the five-foot, five-inch 125-pounder carried timber, cement, water and other construction materials a half mile up the rough mountainside to use in building a crude shelter to keep him out of the sun, snow and rain.

On December 10, 1965, District Ranger John Waters sent Francis a letter to the effect that the BLM's hearing examiner had found the claim to be invalid (on November 29, 1965) and that the government would assume ownership of the improvements in 30 days. Francis had no funds, but determined to appeal the Feds decision, he wrote up a



crude appeal himself. On June 22, 1966 the Director of the Bureau of Land Management dismissed the appeal.

It was on August 15, 1966, that Earl Francis took his dog and cat to a neighbor then left his car, wallet and personal papers nearby and walked back up the mountain to the Triangle Dot mining claim. About 5:15 p.m. on that day residents in the area heard a blast. The following morning Francis' car and personal effects were found. Two neighbors went searching for Francis and discovered an area that appeared to have sustained an explosion. Justice of the Peace Kelly Haddad was called from Kearney, Arizona. After examining the site and the fragmented remains, he ruled that Earl Francis had committed suicide, using between ten and 20 sticks of dynamite to blow himself to bits.

It was four days later that Forest Service Attorney Richard L. Fowler sent a



letter to the assistant regional forester saying, "The subject contestee committed suicide on his mining claim. Our file is closed."

On January 3, 1967, Ranger John Waters reported to Coronado Forest Supervisor Clyde W. Doran: "Wood and trash were burned and metal, junk and debris were buried with bulldozer and the site leveled to original contours as nearly as possible. The road was drained, put to bed and closed. Close the case."

Twelve years after Francis was harassed to death--October 31, 1978, a Texan, Paul Miller, and some associates examined the site of Earl Francis' Triangle Dot claim. Believing the quartz vein carried worthwhile values, they located two claims, the Halloween and the Spook, and set about drilling holes and cutting samples. Four six-foot holes were drilled. Assays on the cuttings were as



follows: #1 Au 0.27, Ag 5.10; #2 Au 0.14, Ag 3.90; #3, Tr & tr; #4, Au 0.03, Ag 0.70; #5, 0.21, Ag 11.60.

Miller and his associates spent a number of months doing development work on their claims. Eventually they sold them. The current owner has been mining them on a small basis--apparently profitably.

Prescott National Forest, Arizona

The Happy Home lode mining claim was located in the Groom Creek Mining District, Yavapai County, Arizona on April 9, 1948. The district was noted for its production of gold from both placer and lode mines over a period of nearly 100 years at the time this claim was located.

In 1952, it came into the possession of Miss Emma M. Andres of Prescott. Soon after becoming the owner of the property, Miss Andres agreed to allow Gilbert W. Quick, to stay in a 10 by 14-foot cabin



that was on the property, serving as a caretaker-watchman.

The Forest Service began action in 1960 to remove Quick and the cabin from the mining claim. On June 6, 1962, Roy T. Helmandollar, manager of the Phoenix office of the Bureau of Land Management requested U.S. Forest Service Attorney, Richard L. Fowler to contest the claim on the grounds: (1) there was no valid discovery; (2) the property was non-mineral in character. On July 20, 1962, the claim was declared null and void by the BLM and Miss Andres was notified by the Forest Service to vacate the property and to remove the improvements on Dec. 31, 1962. This she failed to do and Gilbert W. Quick remained in the cabin.

On January 2, 1963, the Forest Service posted the building as property of the United States Government. Early in the morning of January 8, 1963 a neighbor



(getting up in the night to put wood on the fire) noticed a red glow in the direction of the Happy Home cabin. Authorities were immediately notified. Prescott National Forest District Ranger Fritz Menninghaus arrived on the scene. Unable to get very close to the cabin because of the heat of the blaze, he saw what appeared to be a body in the burning structure. About 4 a.m. he contacted the office of the Yavapai County Sheriff with the information that there was a body burned up in the cabin.

Yavapai County Sheriff Al Ayres, accompanied by Dr. Albert Daniels, County Coroner Dan Seaman and Prescott Courier photographer Ivan Murray went to the scene early in the morning.

What Dr. Ritter said he believed were human remains were collected from the burned-out cabin, put into a container and taken to the sheriff's office in Prescott.



On January 18, 1963 Coroner Dan Seaman and a six-man coroner's jury signed Verdict No. 1925, saying, "John Doe, Happy Home Lode Mining Claim, Groom Creek, Ariz., died January 8, 1963 of 'unknown causes'. Autopsy performed by Dr. Albert Daniels."

How and why John Doe (Gilbert W. Quick) died remains unknown. Suicide was ruled out. Quick's .38 caliber Colt was found seven feet from the body. There were no cartridges or cartridge cases in the revolver. The facts point to a thorough destruction of all evidence:

1) Arizona law states that the results of a coroner's investigation must be filed "forthwith," with the Clerk of the District Court. Coroner Seaman did not file the verdict until July 12, 1963--six months later;

2) No death certificate was ever filed for either a John Doe or Gilbert W. Quick;



3) Dr. Albert O. Daniels refused to release a copy of the autopsy report to the inquiring news media (who doubt that an autopsy was ever performed or that a report was ever made);

4) Newspapers--The Prescott Courier included--carefully preserve their file copies of their papers. The Prescott Courier's file copy of January 9, 1963, which contained an article and pictures--one of which showed District Ranger Fritz Menninghaus looking at a portion of the charred cabin where John Doe's (Gilbert W. Quick's) body was found, has disappeared;

5) Newspapers value their negative files, but according to the management of the Prescott Courier, they cannot locate the negatives that their photographer Ivan Murray made--and he says should be in the Courier's negative file--showing the fire scene and the charred body;



6) Dr. Albert Daniels replied to a query, "I am unaware of the final disposal of the remains to which you referred";

7) Lucille Johnson, Clerk of Yavapai County Board of Supervisors wrote, "In answer to your inquiry concerning the burial of the remains of a body believed to be Gilbert W. Quick, but who is identified in county records as John Doe, we have made careful search of our records but cannot find any record that the county paid for the burial of this person"

8) Both the Hampton and the Ruffner mortuaries say they did not handle final disposition of the body--John Doe or Gilbert W. Quick;

9) Wayne Saunders at the Veterans Administration in Phoenix says they did not receive any claims for a burial allowance for Gilbert W. Quick;

10) Yavapai County Sheriff Al Ayres replied to an inquiry of the disposition of



the remains found in the ashes of the cabin with, "No burial arrangements were made."

All of this took place at a period when the Forest Service was actively purging the national forest of unpatented mining claims. They were particularly contesting any claims upon which there was a structure. The events at the Happy Home Amended Lode Mining Claim struck fear into the hearts of other mining claimants in the area and they abandoned their properties. Several of them indicated to a reporter who inquired into the Gilbert W. Quick matter five years later that they believed that the cabin on the Happy Home claim was torched in the night and that Quick died in an arson-caused blaze.


WAYNE WINTERS



STATE OF ARIZONA)
) ss.
County of Maricopa)

Subscribed and sworn to before me by
Wayne Winters this 9th day of January,
1985.

Beverly A. Beidler
Notary Public

My Commission Expires: July 14, 1987



APPENDIX II

"MINERS GIRD FOR BATTLE

WITH FEDS OVER RIGHTS"

WESTERN PROSPECTOR & MINER

Tombstone, Arizona, November, 1984

Representatives of several organizations of miners in California are up in arms about recent atrocities committed by the U.S. Forest Service against miners and holders of mining claims located on National Forests. In recent weeks they have "gone public" with their battle to seek justice for persons whom they say are being harassed, wrongfully taken to court, and driven from claims that they are operating under the provisions of the mining laws.

A leader in the effort to seek justice for the miners is Flo Maddox, Anderson, California, national president of the Western Mining Councils, an organization with 30 chapters in seven western states.



Other organizations, including United Mining Councils of America and Mother Lode Miners are also participating in the effort.

Western Mining Council members and directors from eight different councils recently picketed and demonstrated in Redding, California, when a Federal Hearing Examiner (judge) heard an action brought by the Forest Service against miner Dave McMullen in an attempt to invalidate his mining claim.

In September Mac Montenegro, president of Salmon River Miners Association, appeared before the Siskiyou County Board of Supervisors requesting aid from that group in overcoming the harassment that miners are receiving from the Forest Service. He told the supervisors that miners are being forced to leave their claims and if they did not leave within a prescribed time period, the F.S. would



threaten the miners and destroy their property. He added, "They tell us how many hours we must work the claim or it isn't a valid claim."

The supervisors also heard from Dick Ober of the staff of the Klamath National Forest in reply to allegations of destruction by the F.S. of miners' property on their claims. Ober said he didn't think the men who impounded personal property on claims destroyed anything, but admitted that he had not seen photographs made of a camp site where the Forest Service had "impounded" certain properties.

The Board of Supervisors have invited Congressmen Gene Chappie and Norman Shumway to Siskiyou County to meet representatives of the miners and the bureaucracies involved.

A meeting of independent miners was held at Happy Camp, California, November 10 and out of it came a "Declaratory



Statement," which is being sent to members of Congress, Forest Service and BLM officials, mining publications and a number of organizations that are involved with mines and mining. It reads, in part:

DECLARATORY STATEMENT OF
INDEPENDENT MINERS

"We are involved in a class action, illegal harassment by government agents. They are acting in contempt of numerous Federal Court rulings and are repeatedly, with malice and forethought, flouting Federal law.

"Using Gestapo tactics, uniformed and armed agents of the USDA Dept. of Agriculture, U.S. Forest Service, are illegally forcing hundreds of independent miners off their legally held mining claims.

"The Department of the Interior, Board of Land Appeals has ruled: The development



of a mining claim cannot be tortured into federal action, major, minor or otherwise, since by discovery of a valuable mineral deposit within its boundaries, its locator acquires an exclusive possessory interest, a form of property which may not be taken, without due compensation.

"Maybe the Forest Service has never heard of the Dept. of the Interior, Board of Land Appeals or their decisions, and maybe they have never heard of Chapter 30 U.S.C.A. 26, or any other of the other sections governing mining and miners' rights, or of the over 200 Federal Court decisions substantiating these laws. Yet one would have thought they should have heard U.S. Magistrate Larry Nord in Eureka, Calif. on Sept. 9, 1983 when he said to the Forest Service, 'Like it or not, that is the law and if you want to do something about it you will have to change the law through an Act of Congress.'



Magistrate Nord was referring to Chapter 30 USCA 26 and the definition of 'mining operation' as restated in U.S. Dept. of Agriculture, USFS Chapter 36 Rule 252.3.

"The court ruled in favor of the defendants in two cases: 1. USFS vs. Billy Mitchel 1-83-111-M; 2. USFS vs. Hanta-Yo Mining 1-83-112-M. The defendants in these cases were found not guilty of camping beyond the 30-day limit. It was found that a miner can camp on public lands as long as he is actively mining.

"Did the Forest Service stop issuing these citations in accordance with the above rulings? No. Do they still point guns at miners and bulldoze their camps? Just ask Jim Gregg of Happy Camp, Calif. He appeared before the Siskiyou County Board of Supervisors on Sept. 12 to complain harassment and seizure of his personal property, the destruction of his



mining claim, and the arrest of his co-worker Bob Biggs.

Biggs was issued a citation for camping beyond the 14-day limit. He was unable to appear due to lack of transportation. (The appearance before a Federal magistrate would entail a 240-mile round trip to Weed, Calif.) He was later arrested by a S.W.A.T. team of 11 armed men. He was forcibly transported to Weed, Calif. shackled with leg chains and handcuffs. The Federal magistrate disclaimed any jurisdiction and remanded him for trial in Sacramento. He was then released to make his way back home (120 miles) with no money and clad in cut-off shorts and tennis shoes.

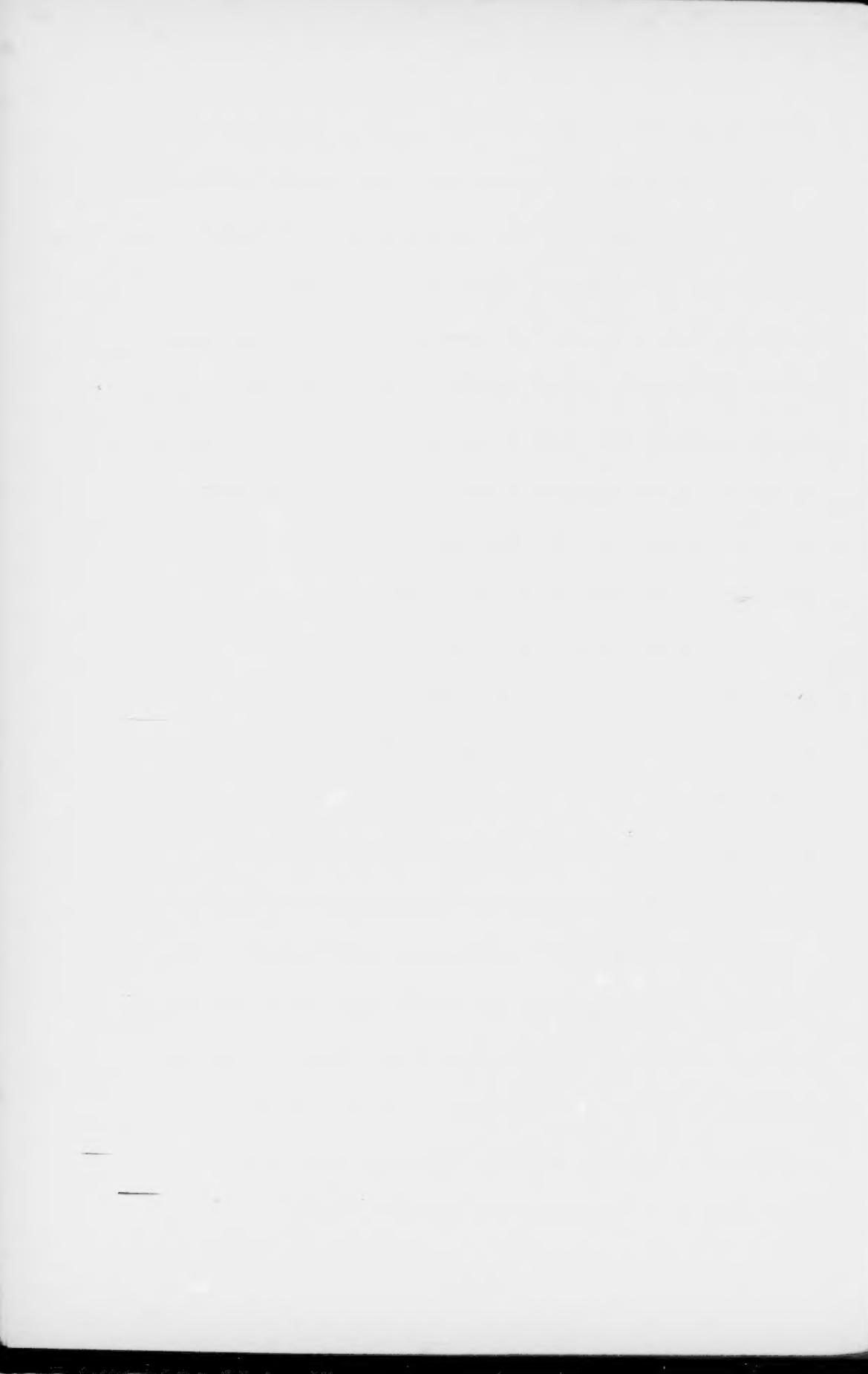
"When the Forest Service ascertained that Jim Gregg had a legal dredging permit they decided he was in violation of Chapter 36 regulations requiring a plan of operation. This was in violation of 43 CFR



3809 1-2 (the law) which says: Casual use -- negligible disturbance. No notification to or approval by the authorized officer is required for casual use operations.

Submitting a plan of operations, Gregg was told he would have to post a \$2500 cash bond before he could work his claim. (This is not required by either of the two actual authorities in the matter -- The Calif. Reclamation Act and the BLM.

"Gregg refused to post the bond. The Forest Service said he was trespassing and ordered him to cease operations and vacate the claim. When he refused to obey this unauthorized order the Forest Service's armed S.W.A.T. entered onto the claim, confiscated Biggs' dredging equipment, the personal belongings of both men (including toilet paper), destroyed the camp, leaving behind a pile of rubble. It was done without a court order. Gregg was billed for the F.S. "cleanup" activities.



According to the "Declaratory Statement," 'Jim Gregg's story is typical, not an exception. Hundreds of independent miners are being harassed right now with terrorist tactics by the Forest Service. The list includes James Settee of Scotts Bar, Calif., Karin Kaplon of Yreka, Calif., Jeff White on the Illinois River, Billy Mitchel on the Siskiyou Fork of the Smith River, Tom Forqueran on Patrick's Creek and Fred Lowe of China Garden. All have one thing in common -- Their rights as Americans to lawfully engage in their chosen profession.

GRIEVANCES

"Although the grievances of the mining industry against the Forest Service are many and varied, they mostly have one common denominator -- This is unauthorized regulation allowing hundreds of Forest Service personnel, in dozens of locations, to make arbitrary decisions that may or may

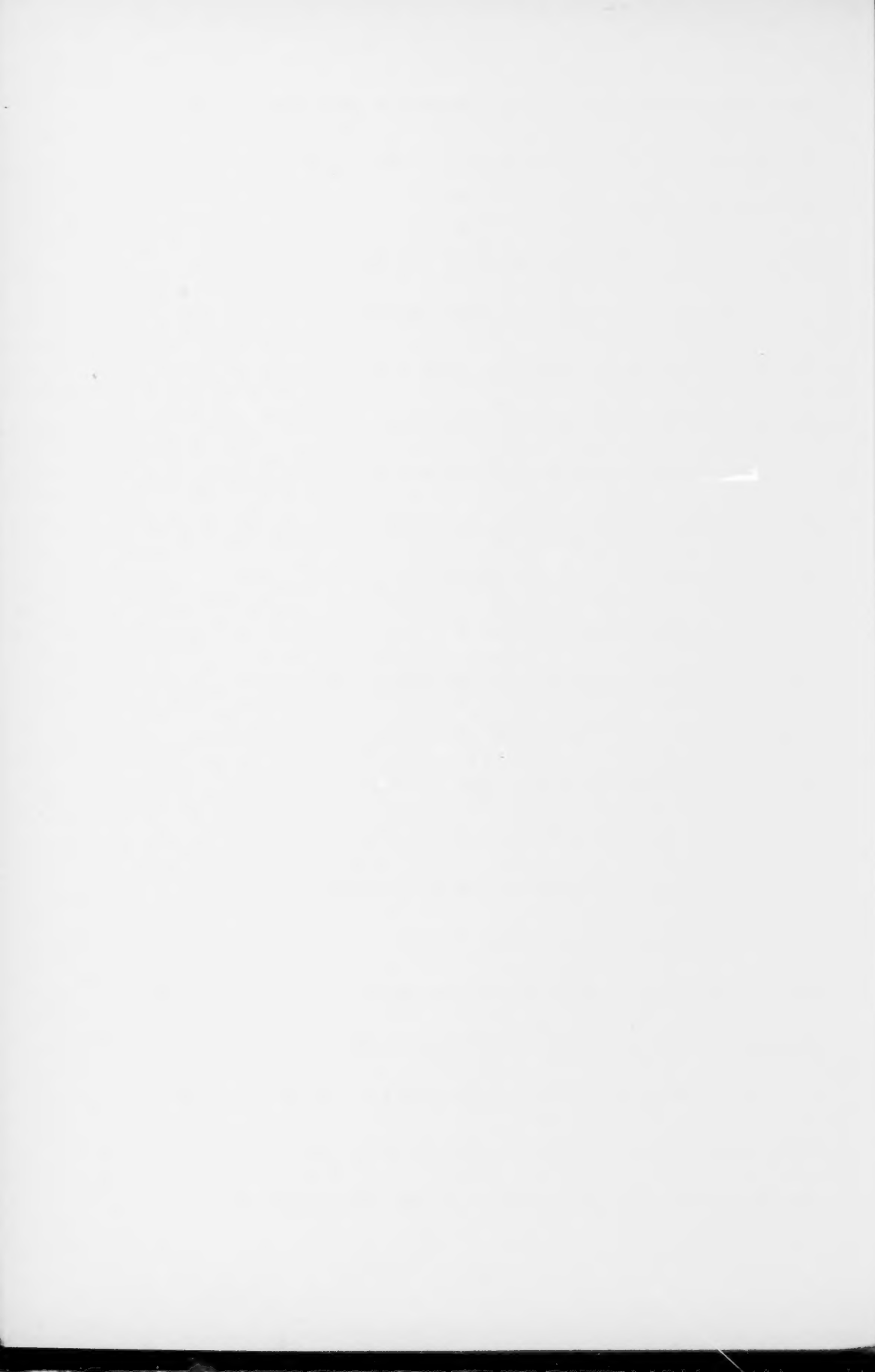


not be legal but are usually obeyed simply because it is costly and impractical to contest them.

PETITION FOR REDRESS

We, the INDEPENDENT MINERS, now come to protest and submit the following list of grievances for which we seek relief:

1. The immediate cessation by the Forest Service in their regulation of mining claims under USDA 36.
2. Immediate status of 'cureable defect' for cases of failure to comply with the parts of the regulations that exceed the requirements authorized by law.
(F.L.P.M.A. 43 USC 1744 '1976' currently).
3. Initiation of a program of restitution for those "curable defects" which wrongly and without authority caused damage of loss of life, property or income.
4. Any future agreements between BLM and the Forest Service for the cooperative management of mining claims on public



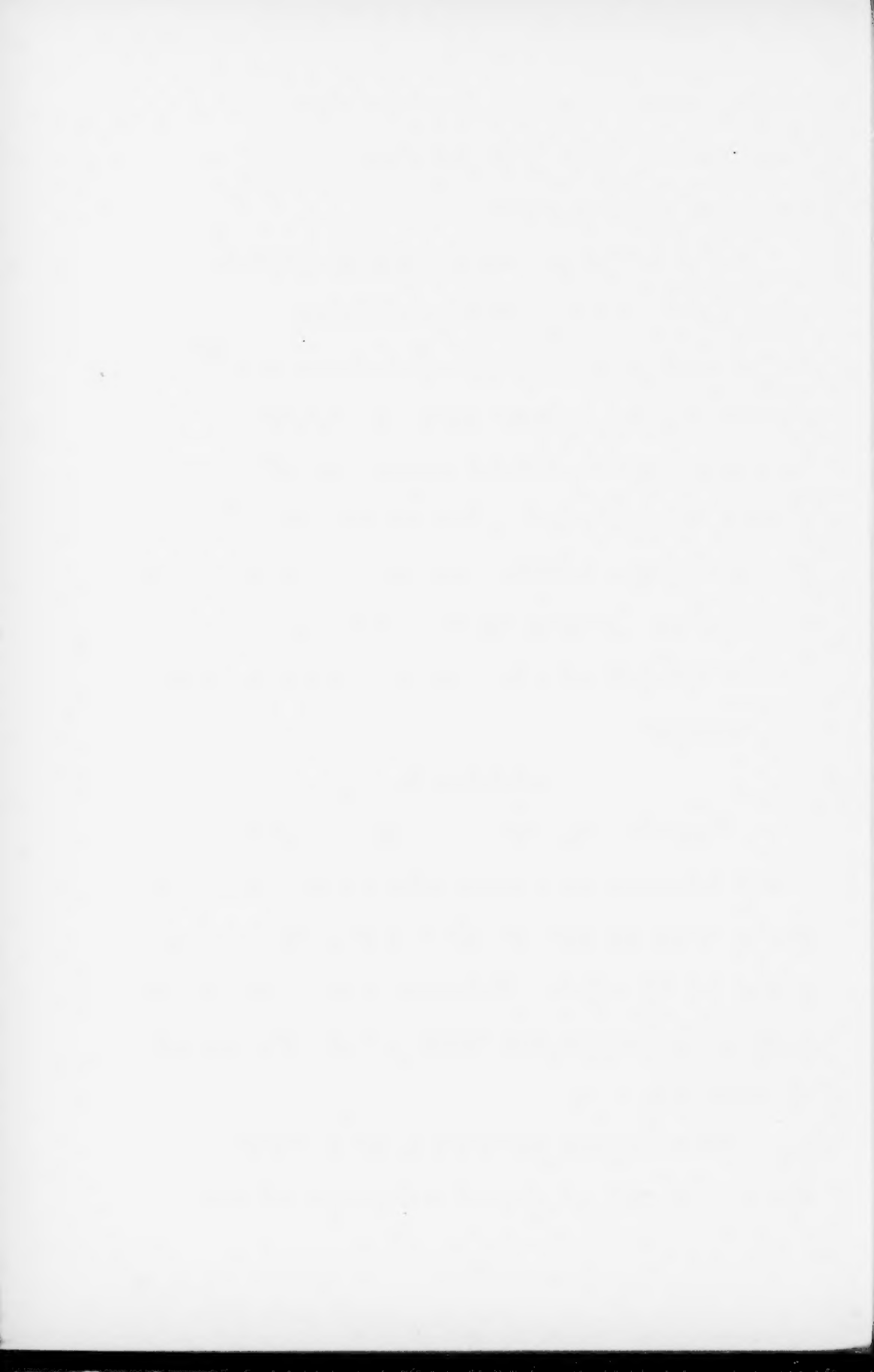
lands, shall clearly include the requirement that they be governed by existing mining laws.

5. The formation of a cooperative committee to draft and submit for ratification of "simple and clear cut guidelines of mining laws" in layman's language, which can be fully reproduced and widely distributed. The guidelines must differentiate between casual use operations and mining operations and include the determination of binding requirements and the amounts.

SUMMATION

"The Mining Law is clear. We have 112 years of laws and decisions to guide us -- going back as far as 1872 and progressing right up to 1984. Numerous court decisions have pointed out the intent and the letter of the law.

"The Forest Service acts without authority and in direct contempt of the



law, often forcing law-abiding citizens from their mining claims on the public lands.

"All semblance of government by law is fading away where the bureacratic Forest Service and its edicts is concerned. This cry for 'law and order' is the plea of those who are drowning in so many unauthorized rules and regulations. Law-abiding citizens can not follow the rules unless they are stated clearly.

"Perhaps one day the prospector in man will die -- and with him the fighter, the wanderer, the explorer, the adventurer, the rover, and doer and the hoper. Then they would become, as many of the bureaucrats desire, like cattle and sheep -- spending placid days while grazing in Federally-controlled pasture. But not yet! Not without a fight!"

Persons close to the mining organizations have expressed their belief



that the Federal agencies charged with administering the public lands -- the Forest Service and the Bureau of Land Management -- are intentionally stepping up their harassment of owners of unpatented mining claims preparatory to the initiating in Congress once more of legislation which if passed into law, would place all mineral on the public lands under a leasing system, thusly nationalizing the mining industry. They point out that if this should happen it would mean the end of the small miner -- leaving only the biggest of firms in a position to compete for mining leases.



APPENDIX III

LEGISLATIVE PURPOSE OF PUBLIC LAW 167

(30 U.S.C.A. 611)

ABSTRACTS FROM:

Hearing before the Subcommittee on Minerals, Materials, and Fuels of the Committee on Interior and Insular Affairs (CIIA) United States Senate, Eighty-Ninth Congress, Second Session on S. 2281 and S. 3485, Bills to Amend Section 3 of the Act of July 23, 1955 (69 Stat. 367, 368). June 28, 1966.



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letter to Hon. Ernest Gruening, chairman,
MMFS, dated June 23, 1966.....65



COMMON VARIETIES ACT AMENDMENTS

Tuesday, June 28, 1966

U.S. Senate

Subcommittee on Minerals,
Materials, and Fuels of the
Committee on Interior and Insular Affairs,
Washington, D.C.

Senator Gruening . . . At the hearings in May 1955, on Senator Anderson's bill S. 1713, it was brought out that the mining laws were being used by persons, who for the most part were not miners, to obtain title to hundreds of thousands of acres of valuable timber belonging to the people of the United States at no cost to themselves, and subject to little or no control by the Forest Service. The infamous Al Sarena case is a glaring example.

Also, mining claims were being used as a means of obtaining rent-free and cost-free tracts of land belonging to the people of the United States to taverns, motels,



and other commercial enterprises which bore no relationship to mining.

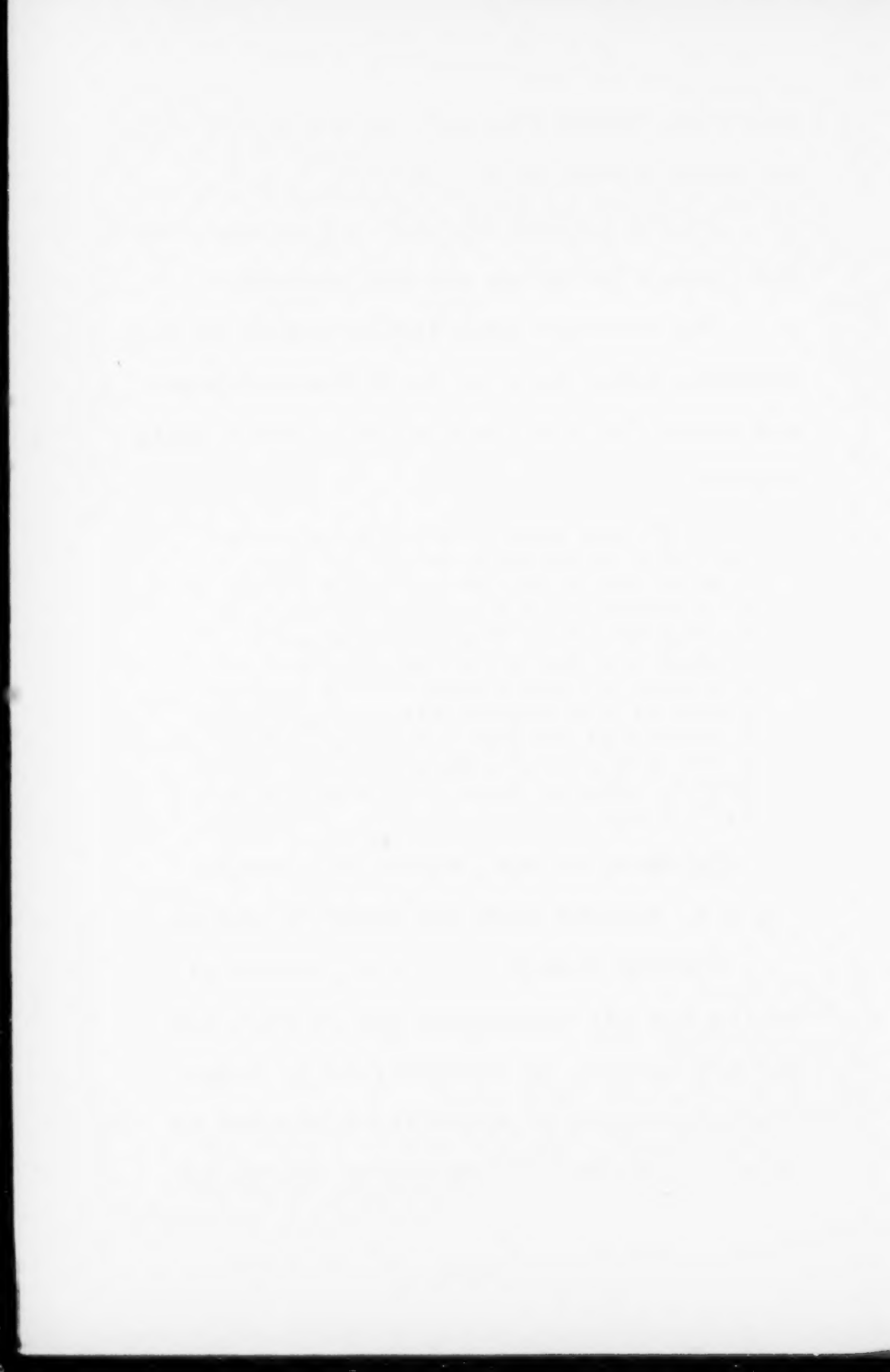
It was to correct such situations that the Common Varieties Act was enacted.

The Interior Committee's report on the measure, after setting forth the purposes and needs for the legislation, specifically states:

At the same time, the measure faithfully safeguards all of the rights and interests of bona fide prospectors and mine operators. In no way would it deprive them of rights and means for development of the mineral resources of the public lands of the United States under the historic principles of free enterprise and private ownership of the present mining laws. (S. Rept. 554, 84th Cong.)

**STATEMENT OF HON. HOWARD W. CANNON,
A U.S. SENATOR FROM THE STATE OF NEVADA**

SENATOR CANNON . . . The purpose of Public Law 167 apparently was to preclude the possibility of unauthorized or fraudulent locations by speculators who had no intention of developing mining operations,



but were interested only in gaining title to surface land.

This is a sound and wise purpose, but the interpretation of the law by the Interior Department has been unrealistic and has resulted in grave problems in that the Interior Department has acknowledged no difference between common and special or uncommon varieties of sand, gravel, building stone, and other building materials.

. . . The Department of Interior has consistantly held in recent years that all sand and gravel and similar deposits are of a common variety - an interpretation that excludes all special varieties of building materials from location under the mining laws. The interpretation also failed to consider or recognize the type of materials needed by the construction industry.

Moreover, Mr. Chairman, the adoption of this position by the Interior

Department, in my opinion, clearly ignores the intent of Congress at the time it passed Public Law 167.

If the purpose of the law would have been to eliminate all varieties, the language of the act would have so stated. The Congress, however, specifically added the word "common" to make it clear that only common varieties would be excluded, leaving special varieties of building materials subject to the mining laws.

The chairman also outlined two other areas of serious difficulty:

1. The lines of cases in which the Solicitor has redefined and modified the "prudent man" test of discovery has led to instability of departmental policy.

2. The seemingly arbitrary and capricious method in which mining claims have been contested and frequently invalidated is an extremely disturbing source of constant discontent in the mining industry.

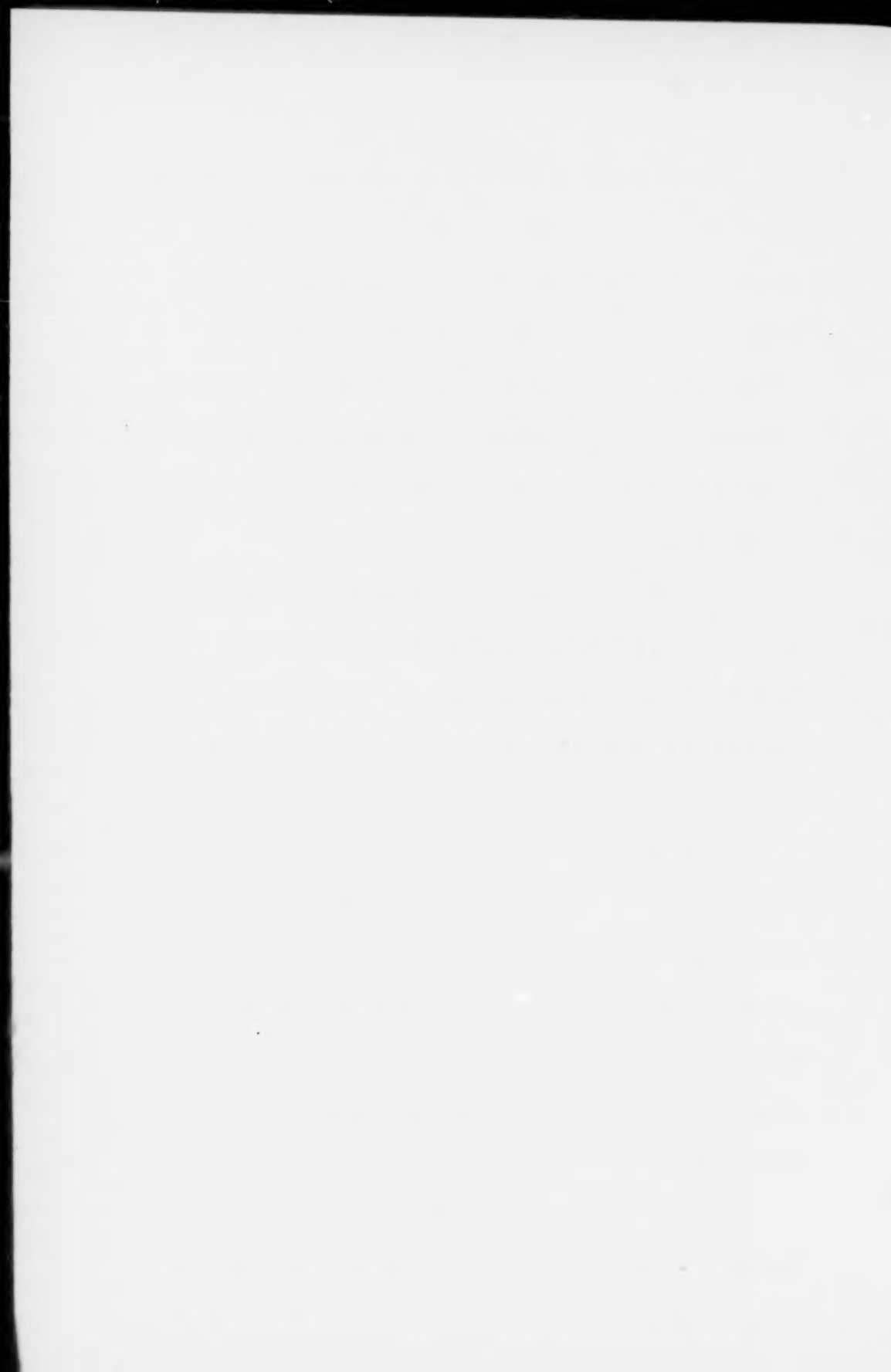


With regard to the firm conviction of many of us that Congress intended that special varieties of sand, gravel, and similar materials should be subject to location, it should be pointed out that in 1965 the sand, gravel, and crushed stone industries produced 880 million tons valued at \$910 million.

These figures should make it obvious that not all sand and gravel deposits are "common" and have no value. Special varieties are valuable resources and are essential to our economy.

I also think it is important to note that the American Society of Planning Officials estimates that some 42 billion tons of special-purpose sand and gravel will have to be produced within the next 30 years to meet construction needs of this country. . .

James Henderson, who will testify today in behalf of the sand and gravel

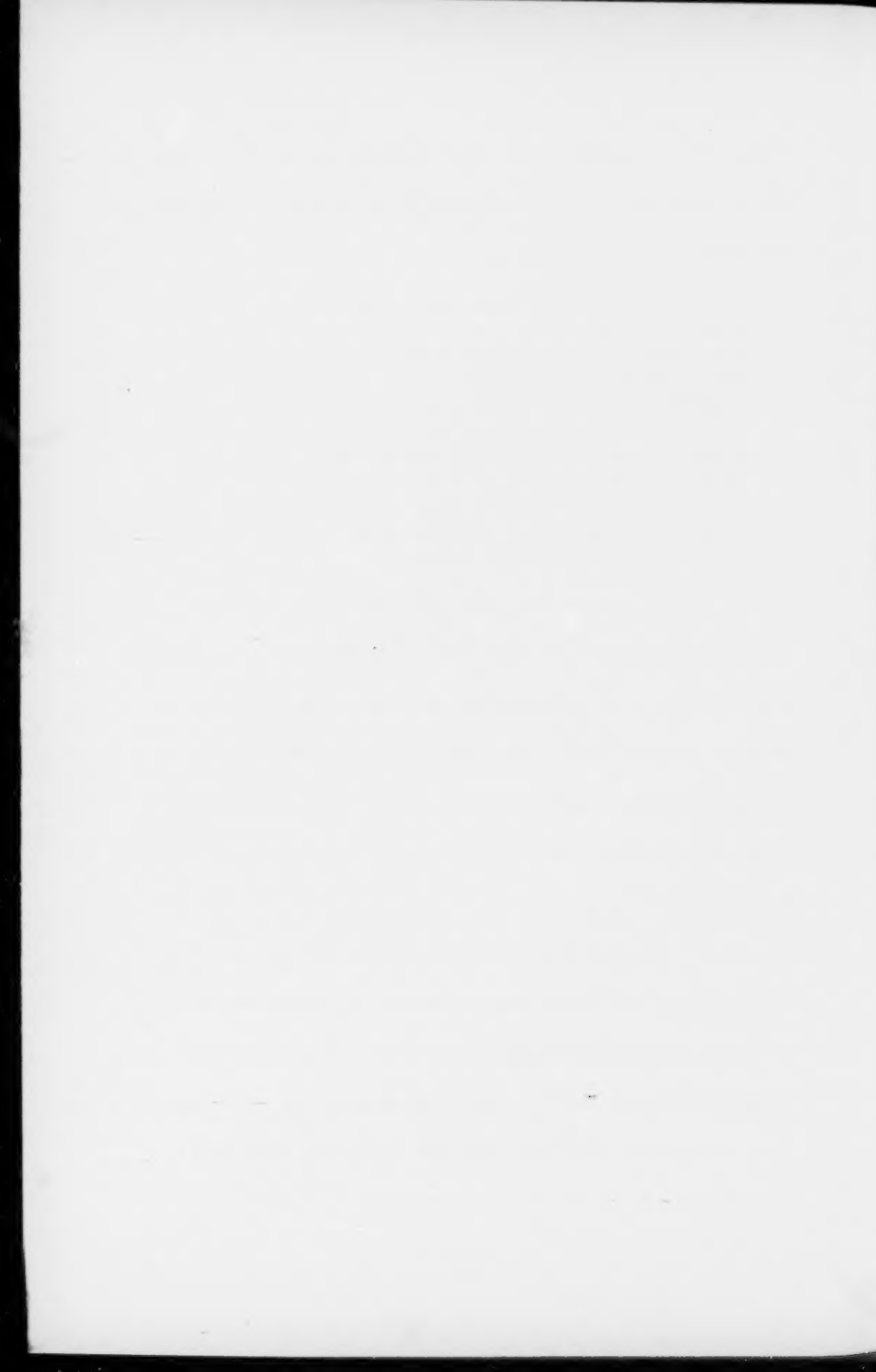


industry, summed up the industry's problem in a recent issue of "Rock Products," when he said:

I believe the major problem the sand and gravel industry faces . . . springs from a basic confusion as to what sand and gravel is. To the layman . . . it is just a common substance that exists everywhere. People do not understand that the specifications for any kind of concrete aggregate utilized under engineering requirements are growing continuously more rigid.

It is pointed out in "Rock Products" that supplies of special, high-quality sand and gravel are growing scarce near booming urban areas and that the Government owns a large percentage of the land in the Western States - about 87 percent in the State of Nevada.

. . . many persons - including officials of the Department of the Interior - have expressed an interest in insuring that land on which sand and gravel claims are located and validated should, in fact, be devoted to mining purposes . . .



It is conceivable that a deposit of sand, gravel, or other material might be claimed near an urban area, purchased for a very small price, and then immediately developed for purposes entirely foreign to mining.

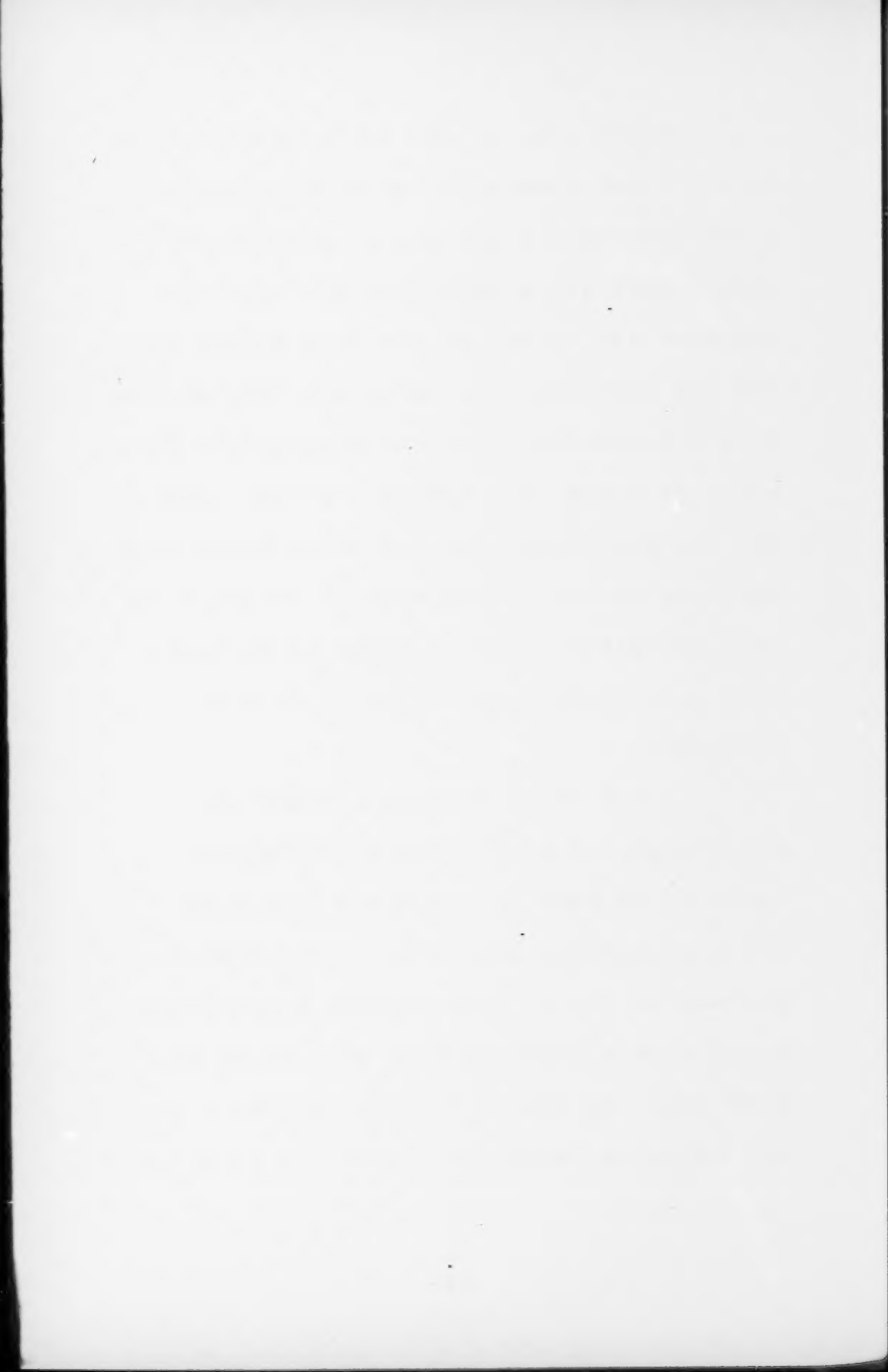
I have introduced a bill, S. 2281, which is designed to recognize that the intent of Congress, when it passed Public Law 167, was to allow the locations of special varieties, and at the same time to protect against fraudulent and speculative locations. . .

I was joined in sponsorship of S. 2281 by Senators Bible, Moss, and Simpson. I have not discussed the common-varieties problem with them since the introduction of S. 3485. I know, however, that they would support any effort to resolve a serious problem faced by sand and gravel operators who have been hard hit by the unrealistic administration of Public Law 167 by the Interior Department. . .



I might add, it was rather interesting in our floor debate on the mine safety bill a few days ago, there was an attempt to remove sand and gravel from the implications of the effect of the Mine Safety Act, and the amendment was defeated. So, we now have a situation where the mine safety laws apply to a mine for sand and gravel, and yet the Department, on the other hand, says that you cannot have a mineral location for sand and gravel, and it seems to me that they are trying to carry water on both shoulders. . . .

. . . I think that this committee could work out a satisfactory solution there if it were incorporated into your bill, to make it absolutely clear that we are not to trying help anybody here except a legitimate mine operator that wants to mine sand and gravel for use in the construction industry. . . .



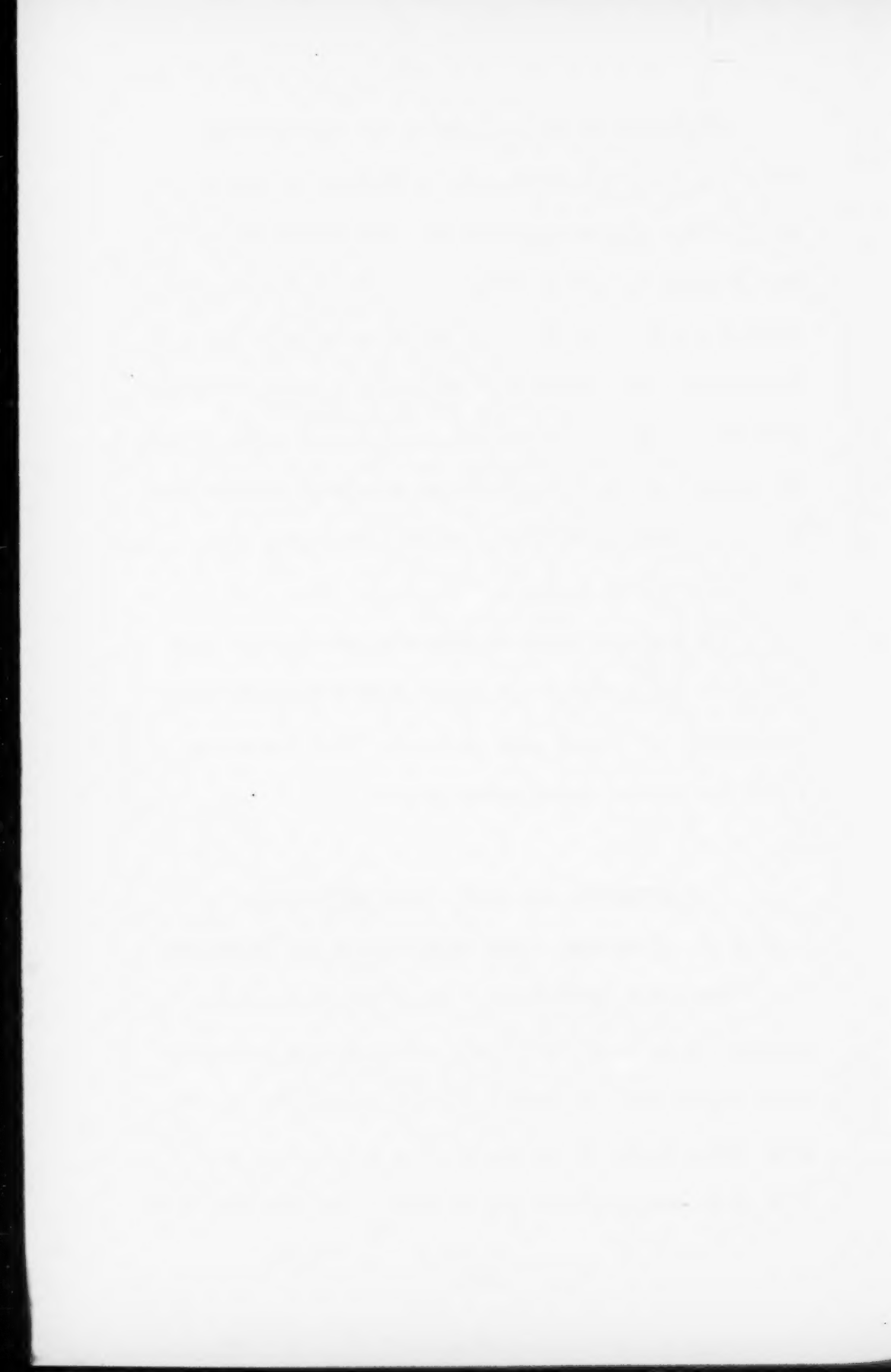
SENATOR MOSS. I have no questions. Just by way of comment, I think it is a very fine presentation of the problem. I was happy to join Senator Cannon as a co-sponsor of this bill. As you have observed, Mr. Cannon, we well could take in the best parts of both; certainly the thing we ought to do is provide against abuse but at the same time not throw the baby out with the bath water.

We should not eliminate entirely the ability of people to file and utilize the minerals of sand and gravel, the same as they do other hard minerals.

STATEMENT OF HON. LEE METCALF,

A U.S. SENATOR FROM THE STATE OF MONTANA

SENATOR METCALF. What we have here today is a problem that constantly plagues any legislative body. That problem is the gap that occurs between the adoption and the implementation of a law. No matter how



carefully we select words intended to direct a governmental agency, the action taken by such agency often fails to correspond accurately with the legislative intent.

That is the case with the Common Varieties Act of 1955. The implementation of portions of that act has not, to my mind, followed the intent of Congress. As a result, hardships have been worked on certain legitimate interests and segments of society. S. 3485 should correct the situation by more precisely defining the action we wish carried out under the law.

The Common Varieties Act of 1955 itself was adopted with the idea of correcting abuses of the Federal mining laws, the basic statute of which went on the books in 1872. These laws permit anyone to go out on the public lands of the United States to look for minerals. If the explorer makes a discovery of a valuable



mineral in place, the law permits him to "make a location" on the site of his discovery. The deposit he has discovered thereby becomes his property. He is allowed to develop it without going through the process of obtaining fee simple title, or he may become the owner of the land itself by complying with certain statutory requirements.

The mining law of 1872 and its subsequent additions played a major role in opening the West to the mining industry. But over time, abuses began to occur. As land became more scarce, more unscrupulous persons - persons with no interest in or knowledge of mining - used the law as a vehicle through which to obtain valuable tracts of public lands.

Spurious claims were filed as a subterfuge for the purpose of acquiring free land for summer homes, private hunting preserves, commercial enterprises or for



surface values. Many people were making filings under color of the discovery of sand, stone, gravel, pumice, pumicite or cinders, all of these being minerals within the meaning of the Federal mining laws, and, Mr. Chairman, may I comment on Senator Cannon's statement at this point.

These are abuses that we intended to prevent when we passed the Common Varieties Act. I was a Member of the House of Representatives and participated enthusiastically in the passage of that legislation. The chairman of this subcommittee has mentioned the notorious Al Sarena case.

I can recall when we built Hungrey Horse Dam, Mr. Chairman. There was only a little bit of land up through that steep and precipitous canyon. If somebody wanted to open up a bar or rooming house, they filed a mining claim and by the time they had it all litigated, the dam was built and they were off the property.



Collier's magazine, I remember, had a series of articles on the notorious abuses and it is not the intention of anyone of this committee to return to that sort of a situation, and if Senator Cannon's bill is better than S. 3485 in correcting the abuses, it certainly should be wedded to S. 3485 so that we had before the passage of the Common Varieties Act. . . .

Obviously, in acting to stop abuses of the mining laws, Congress desired in no way to impair the rights and activities of bona fide mineral prospectors and mining operators. Senate Report No. 544, which accompanied the Common Varieties Act, stated explicitly:

In no way would it deprive them (bona fide prospectors and mine operators) of rights and means for development of the mineral resources of the public lands of the United States under the historic principles of free enterprise and private ownership of the present mining laws.



I do not see how we can be any more explicit than that as to the legislative intent.

Unfortunately, the hope and intent expressed in this regard has been frustrated by the administration of the act. We have, in fact, interfered with the rights and interests of those who wish to make wholly proper use of the mining laws.

The Forest Service and the Bureau of Land Management have imposed standards, requirements, and tests not envisioned by supporters of the 1955 act. For example, in determining whether a mineral has a "distinct and special value," the Forest Service and the BLM have applied a test of the "end use" to be made of the material.

Under this test, if a rare and valuable material such as travertine - a stone resembling fine Italian marble - is to be used to decorate the lobby of a building, it is considered to fall outside

the law's exemption for material with "distinct and special value." The stone clearly possesses such value. But because its proposed use is common, the agencies have judged the stone itself to be a common variety within the meaning of the law.

Moreover, the Interior Department has chosen to apply an uncommon meaning of the word "common." Members of Congress, I believe, used that word in the act to mean types of stone found in abundance in a number of places. But the Interior Department has chosen to consider as "common" minerals which are common within their own category.

For example, neither travertine nor limestone is found in great quantity in a great number of locations. But the Interior Department disregards that fact, and tests a particular deposit of travertine according to whether it is a common type of travertine, or a deposit of



limestone according to whether it is a common type of limestone. Such a test kills what, in effect, are bona fide mining claims held by substantial mine operators for years and in which substantial sums have been invested in good faith.

Complaints about the narrow and excessively restrictive administration of the Common Varieties Act prompted this subcommittee last June to hold hearings on the problem, both in my home State of Montana and in Washington under the chairmanship of the present chairman of the subcommittee. Numerous specific cases were described for the subcommittee showing how the law was producing results never intended by Congress. . .

. . . One paragraph from the statement of Robert E. Matson, geologist with the Montana State Planning Board, reads:

I believe that the Departments of Interior and Agriculture in their interpretation of "common varieties"

under Public Law 167 have discouraged exploration and development of new nonmetallic mineral deposits by requiring unrealistic lease arrangements and royalty payments. In addition, I believe that the decision of the Departments of Interior and Agriculture to classify any stone used for building purposes as "common variety" is completely arbitrary.

Then if I may read a further paragraph from the statement of Mr. L. H. Larison, who is the president of the American Chemet Corp. American Chemet mines, processes, and sells unusual stones such as arragonite-type onyx, black and gold marble, red granite, green quartzite, and black gabbro:

The black and gold marble is made into terrazzo chips and can also be sold as polished wall panels. This product is similar to one that is imported from Italy.

The black gabbro is located on public domain. It is mined and processed for use as exposed aggregate for buildings and is used in filtration beds in oil refineries. In this latter use it is superior to any other known mineral, and according to Uno M. Sahinen, associate director of the Montana Bureau of Mines and Geology, there is no other known deposit in the United States.



So you see, this arbitrary decision on the end use and the prudent man theory has resulted in the fact that very valuable and scarce stone products have been classified as common variety and as there miners of Montana and of other areas have said, has discouraged development, discouraged exploration, and prevented the development of these new nonmetallic industries.

I was impressed when Senator Cannon pointed out that recently in this mine safety bill we said that part of the mine safety program was going to be the inspection of sand and gravel pits and quarries, and yet, on the other hand, we say in the Secretary of Interior's and in the Secretary of Agriculture's interpretation that these sand and gravel pits and quarries are not mines.

So, I think we should be consistent. I supported the inspection in the mine safety bill and I believe that we should

permit these very valuable minerals, which are not common at all to be locatable under the mining laws, as is traditional in the West. . .

SENATOR ALLOTT. I want to compliment you on your statement, Senator. I have a letter here I want to refer to in a moment. But I wonder if your statement would not apply equally well to a stone which we find in some places in Colorado called rhyolite.

I do not know whether you are acquainted with it or not. We will get the Department of Interior up here and get them to identify it. It is a very beautiful building stone, but it seems to me that it should come within the concept of this bill also. . .

SENATOR ALLOTT. . . in this letter Mr. Joseph Cowan, of Canon City, Colo., refers to the quarrying of marble and travertine both and the new interpretation of the law



which heretofore they had had under the minerals, and I think we intended it to when we passed the Common Varieties Act in 1955.

SENATOR METCALF. Not only did we intend to, but we admonished both the Secretaries of Agriculture and Interior that we intended to carry out the traditional intent of the mining law. (emphasis supplied)

SENATOR ALLOTT. . . Mr. Cowan's letter, . . . says:

"Now we are anticipating of opening a new quarry in Garden Park District on Rocky Ridge. It is open land . . . so we went to take it up as you used to do, found out the new land law has changed it so we cannot operate marble quarry under new regulations.

It takes at least five years for a small operation like ours to get into operation. New law say we have to pay \$1,000 for two-year lease and so much a ton, and after we open it up at end of two years somebody could bid a few cents more and take it away from us, and besides we have a man out of Bureau of Land Management over us, no soap."

This letter clearly illustrates how widespread this problem has become.

I also had occasion to get into the travertine situation in another instance and found that they had decided that travertine was not subject to location anymore.

We have to straighten this situation out. Somehow, somebody seems to have gotten the idea that if anybody prospects and locates minerals on the public domain or ore or rock deposits, it is a steal from the Government. If this were true, I think you would agree with this statement: We would never had had any mining development in the West. Would we have?

SENATOR METCALF. No, I think that the greatest single factor in the development of the West was the mining law of 1872 when people were permitted to come out and locate upon the public domain, explore and try to develop minerals. Montana and



Colorado and Idaho - those great mines in the Cordilleras and mines in Butte - would never have been developed or discovered under the present philosophy of our Interior Department. . .

SENATOR ALLOTT. . . So I get a little concerned when some of our people who are unacquainted with the facts become obsessed with the idea that any location of mineral rights or anything of that sort is a robbing of the public. If the West is going to continue to develop, we are going to have to continue to be forward looking in our laws.

The same thing is true in Wyoming, Idaho, and Colorado. There are far, far more minerals underground that can be used for the development of this country than have ever been taken out so far.



**STATEMENT OF ROBERT E. MATSON, GEOLOGIST,
MONTANA STATE PLANNING BOARD**

I believe that the Department of Interior and Agriculture in their interpretation of "common varieties" under Public Law 167 have discouraged exploration and development of new non-metallic mineral deposits by requiring unrealistic lease arrangements and royalty payments. In addition, I believe that the decision of the Department of Interior and Agriculture to classify any stone used for building purposes as "common variety" is completely arbitrary

**STATEMENT OF L. H. LARISON,
PRESIDENT OF AMERICAN CHEMET CORP.
OF HELENA, MONTANA**

It is a definite hardship on the small mine operator and prospector to continually have his right to mining claims questioned and be ordered to hearings with expert witnesses at considerable expense.



The mining industry in Montana and many other Western States has depended a great deal on mining in the past. Mining activity in the past few years has declined. The present method of administering Public Law 167 is discouraging to the miner and detrimental to the mining industry.

LETTER FROM PAUL GEMMILL

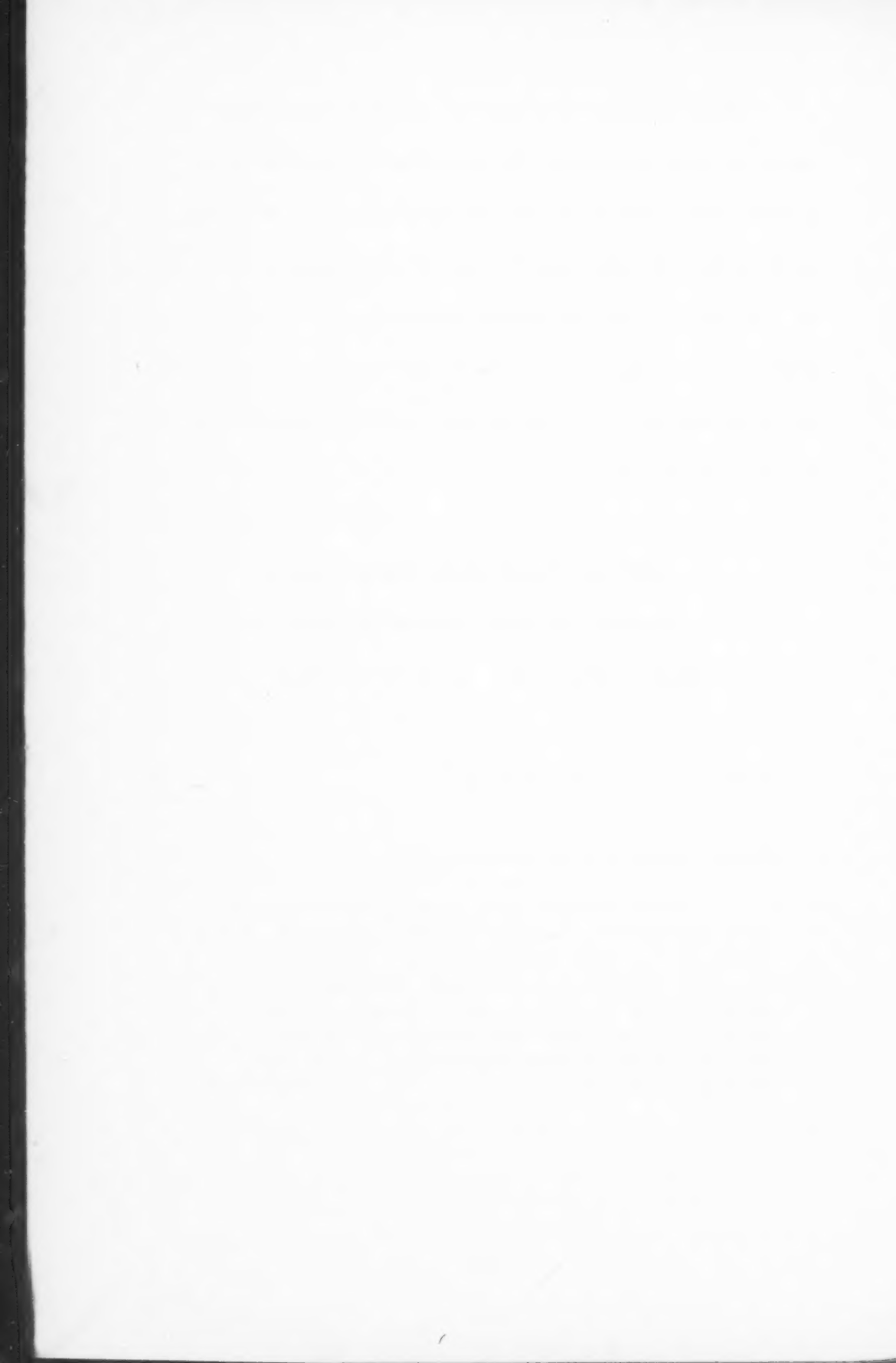
NEVADA MINING ASSOCIATION

Reno, Nevada, June 23, 1966

Hon. Ernest Gruening

Dear Senator Gruening: . . .

Both large and small operators are severely hampered by inability to determine the validity of their claims without testing through expensive litigation. Production from claims not determined to be valid leaves the operator open to heavy liability.




STATEMENT OF HON. ALAN BIBLE,
U.S. SENATOR FROM THE STATE OF NEVADA

The interpretation of the Department of the Interior of the Common Varieties Act which does not distinguish between common and special varieties of building materials has caused frustration and hardship to many legitimate mining interests. It has been a troublesome problem in my State and in other areas and, in my opinion, needs correcting. . .

As a member of the Public Land Law Review Commission, I know this is one of the important areas in which further study will be given; nevertheless, it is a problem for the Congress and I am hopeful language can be developed by this Committee which will permit orderly development of legitimate materials, with proper safeguards, for those who are ready and willing to make investments.





It is true that some unscrupulous practices of the past, such as spurious mining claims, have caused unauthorized uses of public lands. I do not favor such uses and I am sure that none of the members of this committee favors such practices. Irrespective, legitimate mining activities of sand and gravel and other common material should not be sacrificed.

**STATEMENT OF ARTHUR W. GREELEY,
ASSOCIATE CHIEF FOREST SERVICE,
DEPARTMENT OF AGRICULTURE
ACCOMPANIED BY REYNOLDS G. FLORANCE,
DIRECTOR, DIVISION OF LEGISLATIVE
REPORTING AND LIAISON**

MR. GREELEY. . . The remaining provisions of subsection 1 (b) of S. 2281 would effect major substantive changes in the procedures and administration of location and patent of mining

claims. The question, therefore, arises whether these major changes should be enacted before completion of the study by the Public Land Law Review Commission.

SENATOR GRUENING. Well, that would postpone action for some indefinite period, would it not? The Commission is supposed to report by 1967?

MR. GREELEY. . . There would be gray areas out on the edge of the statutory definitions and it seems to us that it is a better approach, both from the standpoint of definiteness and for the standpoint of the flexibility to use the leasing approach rather than definition through an amendment of the statute as to what constitutes common varieties.

That is just a summary of the Department of Agriculture approach here Senator.



SENATOR GRUENING. I think, speaking for myself, I would prefer to wait until we have the report, but maybe some to the other members of the committee would like to comment.

Senator Metcalf?

SENATOR METCALF. I find this a very inconsistent statement. You say that you should await the Public Land Law Review Commission report for some of these decisions and yet you come in with a startling change in our whole concept of locatable property. You want to make it all leasehold.

It would seem to me that consistently carrying out your statement to its ultimate conclusion, you would eliminate the 1872 law and say that every mining claim had to be leased. Would you go that far?

MR. GREELEY. No, sir; that is not what we have said here, Senator.



SENATOR METCALF. You say if you could do this - I wonder how many "could's" you use there. You "could" do this, "could" do this, "could" do this, and if you did that you would have a completely different approach.

It would seem to me that the simple way to accomplish our purpose would be to tell you what Congress meant when it passed the common varieties law. As one Member of the Congress who participated in passing that law and enthusiastically supported it, I had no idea that the Bureau of Land Management and the Forest Service would give arbitrary and unfair interpretation to what we said about common varieties. It seems to me the simple thing for us to do is to say to the Forest Service, and the Bureau of Land Management, when we refer to common varieties we mean this and this and this, and we want you to carry out the purposes of the law.



Is that not a simple approach?

MR. GREELEY. It is a very direct approach.

SENATOR METCALF. Is that not the approach that would be the easiest and the quickest to achieve what the legislative intent was?

MR. GREELEY. Well, Senator, our concern has been that, particularly with reference to sand, stone and gravel, which are very frequent occurrences -

. . . Taking travertine for example -

SENATOR METCALF. Yes; well, should travertine be leasable?

MR. GREELEY. Well, is that objectionable?

SENATOR METCALF. Yes, I think it should be locatable. And I think that that is what we conceived in the Mining Act of 1872.

MR. GREELEY. I can see that for building materials similar to travertine and that type of material which is suitable for use in interior finish, takes a high polish, has an attractive coloring and figure, and so on. I seems to me, speaking personally here, now, that that is not a common variety of anything. And I can see the Land Management problems that are involved there with quarrying this sort of building material being handled without great difficulty under the mining location arrangement. I have to acknowledge that I do not know enough about other substances here in this section, Senator Metcalf, to make a comment about them.

SENATOR METCALF. You want all this material leased and not located under the mining law? (emphasis supplied)



MR. GREELEY. That is my report.

That is correct, sir. . . (emphasis supplied)

SENATOR JORDAN. I have no questions. I think he has made his position abundantly clear, that he wants no location of any of these varieties whatsoever. . .

SENATOR ALLOTT. In the Cowan case which I have here Mr. Cowan - whom I do not know personally, but is obviously a man who has been engaged in this business of quarrying for some 40 years, he and his brother - point out after the decision by the Bureau of Land Management that it would take at least -

It takes at least five years for a small operation like theirs to get into operation.

That is what he says in his letter. In other words, here you have what you admit, from your viewpoint of marble and travertine, should not come within the



common-varieties classification. We have a decision here where these people have to lease, not locate, and can you imagine that we are going to get much development if a man has to spend 5 years - even conceding this is a small operation - developing a piece of land on a lease basis, only to be deprived of it after the development work is done? After 2 years of operation he could be deprived of it by somebody on a competitive lease for a few cents more.

Now, you have a very, very simple economic problem here: What do you do with things like this?

MR. GREELEY. The answer I would prefer to see is an arrangement by which the man who does the development has an opportunity to be able to get a lease without having to go for a competitive bid.

We agree, Senator, that that is a statement that describes a phase of the problem, the thing that is being administered now as the state of the law.



SENATOR ALLOTT. Well, the decision of the Bureau of Land Management says that it can be disposed of. They say, and I quote from a memorandum to the State director in Colorado, on page 3:

As our letter to the Cowan's indicates, there is no question in our mind that this marble is "common variety" -

Common variety in quotes -

by legal definition and that it can be disposed of only under the Materials Sales Act of 1947. We think the Cowan's should be encouraged to purchase the marble under a materials sale contract. We have, accordingly, suggested a course of action for them which we think will be best for them and still be within the requirements of law.

They therefore suggested, and I quote again from the memorandum:

So far as it is consistent with the arrangement projects, we would recommend the following in the event that the Cowan's elect to make a sales application:

(1) That a sale for this material include at least the 40 acres described above:

(2) That a sale in the \$100 to \$1,000 range be made at \$0.50 per



ton, with the understanding that the Bureau of Land Management may reappraise the material in the event of future or larger sales;

(3) That the term of the sale be for as long a time up to the two-year maximum for sales in the \$100 to \$1,000 range as the applicants may desire.

Now, if you can apply your theory to the marble-travertine area, then it seems to me you can as logically apply it to other areas as, for example, you have in the case of vermiculite, in which you have refused locatable locations - you and the Bureau of Land Management.

If I may say so, I do not mean this unkindly in any respect. I do not think your suggestion provides a clear-cut access to the solution of this problem, such as might be gotten out of, as the chairman suggested, a combining of these two bills and the desirable features of each, so that Congress does lay down a clear guideline as to what are common varieties and what are not.



There will always be some things in the never-never land, the gray area, of course, and I do not suppose that we can even solve this completely. But we did not have in mind the extension of this and the prudent-man rule and other funny things that have come out of the Department of Interior when we passed our various mining laws. . . .

Senator ALLOTT. I should make this clear . . . I am sure Mr. Puckett's decision in this matter was not made as an arbitrary matter by him, but was made in the Bureau of Land Management for him.

Mr. GREELEY. I need to make the same comment with reference to my statement to Senator Metcalf that I agreed with him about travertine, that it seemed to me that it does have special qualities. I am not the one who is vested with the authority to make that decision. This is just an observation before this committee, sir.



The decision is, properly, vested under the law in the Department of Interior and the Department of Interior people are the ones who have that responsibility and who do make the decision, and we are guided by their decisions.

Mr. FLORANCE. Mr. Chairman, may I comment just a moment on the problem that Senator Allott described here?

The suggestion that the Department of Agriculture has made actually would avoid the problem of having to meet the competition as described here. Our suggestion would let a person who goes out and with his own endeavor finds one of these deposits, creates a market for it, have a prior right for a lease. He would not have to meet the competition from the outside person.

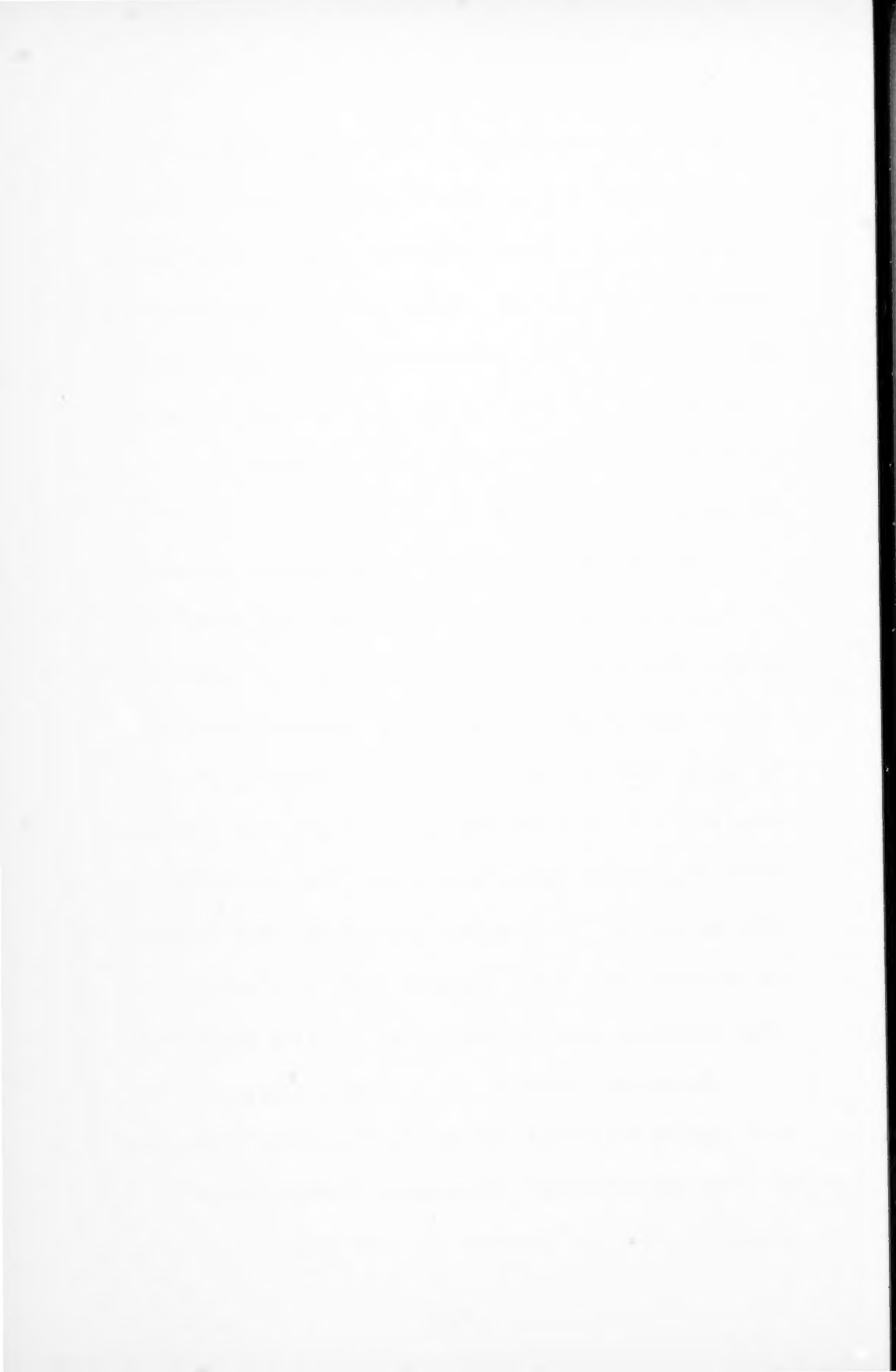
Senator ALLOTT. But let me point out that your suggestion has one very great defect, and that is after he had done all



this and invested all the money and paid the leasehold for the first 2 years, even though he may have a prior right, the basic termination of the lease money that must be paid lies in the Department of Interior, from which he has no appeal except to give up his lease and let somebody take advantage of his work.

Mr. FLORANCE. Well, we would assume, of course, that the 2 year period also would not be a limitation, that a lease under the proposal we have suggested could be made for a long period of time and, of course, it is contemplated that the payment that would be made would be the value of the material in place, allowing the lessee to obtain the full benefit of his own improvement and processing of the material.

Senator ALLOTT. If I may suggest it, and again without being reflective upon any of the particular personnel here, what seems to be forgotten in our big



bureaucratic Government is that these people for the most part are people of extremely small means, who are just trying to get ahead under what we have always considered to be the American way of life: That a man who wants to go out and work like a dog and has imagination can make his own way.

Therefore, the minute you put such a man in a position where he has to cope with decision, either of the Department of Agriculture or BLM or Interior, whoever it may be, that he is lost. He does not have the finances to do it and, therefore, it is the equivalent of just shutting him off at that point. This is a classic example of the type of people who are doing this work.

They are small people, small operators, with small financial means, just trying to make a living for themselves and, of course, I suppose also sometimes trying to look forward to the future and even build a fortune for themselves.



But this is still permissible, I think, outside of Wall Street. I hope so. And I just want to bring this to your attention, because the minute you put these people in a position where they have to cope with sending a lawyer down here to fight with the BLM or the Department of Interior, you just effectively chop this fellow's head off and he is through.

**STATEMENT OF JOHN B. LONERGAN,
ATTORNEY FOR VARIOUS MINERAL INTERESTS**

In the course of my practice of law, since the so-called common varieties act, section 3 of Public Law 167, was enacted, I have observed some unfortunate and disastrous experiences of bona fide prospectors and miners. It is so hard to sit in an office or to visit your clients in the field and to observe their frustration, their disappointment, their inability to proceed without danger of

incurring extreme potential financial liability, because of the uncertainties arising out of the administrative misinterpretations and expansions of a statute which, if we look at the Congressional legislative history, was very clear in its intent.

The need for clarification is pretty obvious. The protest which has come from the industry began way back soon after the 1955 act became law. The matter has snowballed. It takes years for an administrative proceeding to develop through the respective processes into a final decision by the Secretary or into a case which can be considered by the courts. It is absolutely no answer to say that a miner or a prospector or a big mining company has a way to obtain relief through the administrative process. It is not equitable, it is not fair, and it is not true. - - - -



Second, it takes time. In a competitive world of today, you cannot stand by while a deposit is lying there and you go through the several processes of, in my experience, 3 to 6 to 7 to 8 to 9 years of obtaining administrative and legal court relief leaving either the property undeveloped while you competition goes on, or risking untold liability by operating the property in the face of uncertainty of title.

I think it is true that when anyone operates a material deposit charged as being a common variety on the theory that the deposit is not a common variety, if that individual is wrong, the potential financial liability is horrible, because the statute never runs against the Government. There is no telling what the measure of damages will be, although you can be sure that one measure of the damages will be the extremely expensive defense of



a lawsuit brought by the Government lawyers. - -

I suggest that the latter relief, if there is any - I hope there will be - will come many years from now. The industry cannot wait. I think one other thing that should be called to your attention and is in the forefront of my mind at the moment is this: People talk as though section 3 provided a statement or an indication of what could be located as a mining claim and what could not be located as a mining claim in the field of these common materials. This is not true. Section 3 states that common varieties of the named materials were removed from the category of those locatable. I do not say anything about the continuing legal requirement that is absolutely present in all of these occasions that those deposits to be located must also be valuable mineral deposits within the meaning of the mining law.



This is known to the Department and the Forest Service and to the industry, including all prospectors or miners.

There is another suggestion. . . . The element of good faith is also an absolute requirement in the location of a mining claim. This, too, along with value, is required, and consequently, one who locates a deposit of sand, stone, gravel, pumice, pumicite, (or cinders, etc.) if he hopes that it is an uncommon variety, must still have been acting in good faith and must be able to show that it was a valuable mineral deposit within the meaning of the mining law. . . .

I might say, and I do this not facetiously at all, that it would be helpful if the people who decide for Government agencies were to take a turn, perhaps a sabbatical leave, in the field working for a prospector, a miner, or a mining company, to realize the practical



problems in the day-to-day operation before they suggest changes in the mining law or in its construction. I do this respectfully. I think it would be very helpful. I know it is impossible, but I think that it does help to know that there are practical problems.

The statement of Mr. Greeley for the Forest Service - I do not know Mr. Greeley - but it impresses me as being a bid for the maintenance of the status quo, at least, and an ultimate change to the leasing process.

Gentlemen, the leasing process is no relief to a prospector or miner who wishes to go out and develop a body of material which he finds. It takes money, it takes time, it takes extensive development on building stone just as well as anything else, in most cases for real commercial operation, and this cannot be done safely or satisfactorily under a leasing system.



You cannot finance large plants or mining deposits, mineral deposit developments, on uncertainties, and consequently, what is needed is certainty; it is certainty in tenure; it is certainty that is provided by the basic 1872 mining law as clarified by such a statute as is proposed by the bill S. 3485. . .

. . . As I understand the bill and your statement in offering it, Senator, it was intended to clarify and to express the intent of the Congress as it existed in 1955.

SENATOR METCALF. That is right.

MR. LONERGAN. And which has been misinterpreted.

SENATOR METCALF. Distorted.

MR. LONERGAN. Distorted, to use your word, and overextended and as I have suggested rather dangerously to the entire mining industry by the interpretations and actions of the Department.



SENATOR ALLOTT. You mentioned the situation with respect to the copper deposits. A lot of people who go out and prospect are not necessarily mining engineers even in this day and age.

Whate could occur, and would you comment on the question you raised, whether you intended to raise it directly or not, with respect to a person who filed a location on what is without question a valuable mineral. Then it develops that as a result of circumstances or highways or any one of a dozen things that might happen, the chief value of the location is not because of the original filing but because of the common varieties of sand, stone, pumice, or something like that which was also found on this particular area? What would be the situation in this instance? Suppose the patent had not been issued at the time this became obvious and the man had taken out 50 times as much



dollar value of gravel or some other common variety as he had taken out of the locatable mineral? Where would we find ourselves in such a situation and does it need attention in this bill? . . .

MR. LONERGAN. . . I think that it would be certain under the present administration rulings and practices that the Bureau of Land Management, the Department , and, if the Forest Service were involved, the Forest Service, would take the view that the claim was not valid.

SENATOR ALLOTT. . . But you still believe that this leaves an area of much confusion?

MR. LONERGAN. Yes, sir, I do. The example, I believe given - it is either in the Senate or House report on the 1955 bill - was the finding of gold in the sand and gravel of the bed of a stream. That is a typical example.



If the Bureau of Land Management takes the view that the sand and gravel - all sand and gravel is common variety and therefore not locatable - unless the locatable mineral provided a valid discovery under the mining law with respect to the other minerals contained in it, there would be no help to the owner from all of those facts.

In my view, the fact that there was useful and valuable sand and gravel on the claim plus useful and valuable other mineral, and the other mineral was not sufficient of itself to support the claim as a valid mining claim, under the current rulings of the Bureau then the entire claim would fall.

(WRITTEN) STATEMENT

OF JOHN B. LONERGAN . . .

The full Committee made this plain when it reported out the bill which became



the 1955 Act. Senate Report No. 554, (84th Cong., 1st sess., p. 2) states:

"At the same time, the measure faithfully safe-guards all of the rights and interests of bona fide prospectors and mine operators. In no way would it deprive them of rights and means for development of the mineral resources of the public lands of the United States under the historic principles of free enterprise and private ownership of the present mining laws."

In discussing the background of the measure, Senate Report No. 554 (p. 3) noted that "our mining industry is under the constant necessity of exploring for the developing additional sources of new and old minerals to meet the ever-increasing requirements of our national security and industrial economy."

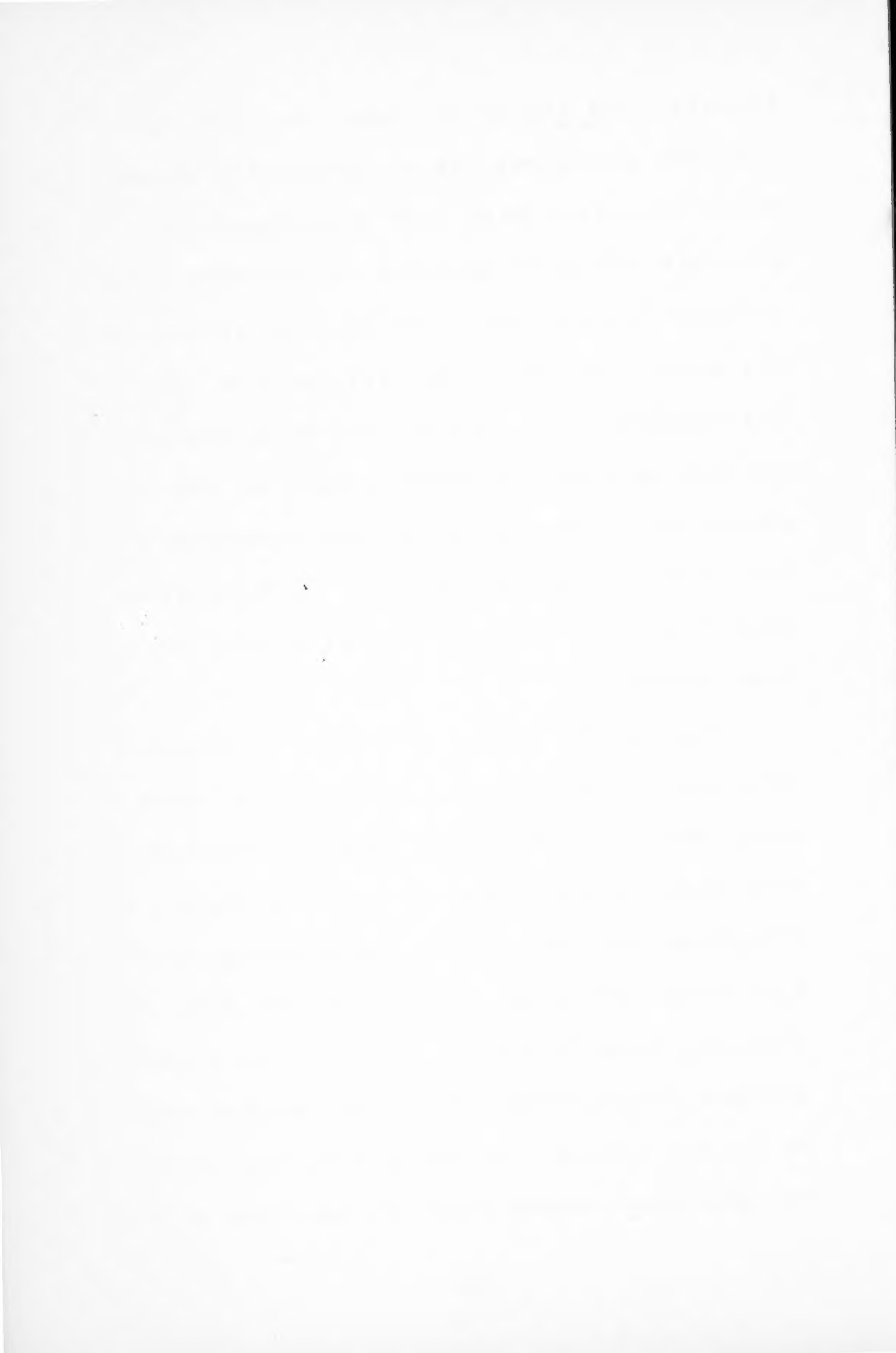
The executive department reports in support of the 1955 measure, included in Senate Report No. 554. clearly disclosed the belief that the provisions would strike at the reported abuses of the mining laws, without interfering with the activities of bona fide prospectors and miners.

Interiors report noted that the national interest in encouraging the discovery of minerals dictated that the mining industry should have a continuing opportunity to locate claims, to mine minerals on those claims, to discover and develop commercial deposits and, if fortunate, to make a profit. This report of the Department, in noting the abuses at which the measure was designed to strike, pointed out that many claims had been on deposits of sand, stone, gravel, etc., which, although technically of sufficient value to justify a location, were actually of minor worth compared to other natural resources of the land.

The Under Secretary of Agriculture similarly reported, saying in part that the Department of Agriculture desired to encourage legitimate prospecting and effective utilization and development of the mineral resources of the national

forests, and stated (S. Rept. No. 554, p. 17): "We would not favor legislation which would interfere with such development of minerals nor work hardship on the bona fide prospector or miner." He further stated in his report (S. Rept. No. 554, p. 18) that the measure "will correct deficiencies in the mining laws and prevent many of the abuses by other than bona fide minerals, but it will not obstruct or interfere with bona fide mineral prospecting, mining and development."

During the debate on the bill, Senator Anderson stated (Vol. 101, Part 7, p. 9334, Cong. Rec. June 28, 1955) that effort had been made to draft a bill that would meet a situation that was rapidly developing into a national emergency and yet at the same time not interfere with the existing rights of bona fide mining activities, either then or in the future. In explaining the bill he said that, among other things, the bill



would provide"that deposits of common varieties of sand, building stone, gravel, pumice, pumicite, and cinders on the public lands, where they are found in widespread abundance, shall be disposed of under the Materials Act of 1947 rather than under the mining law of 1872."

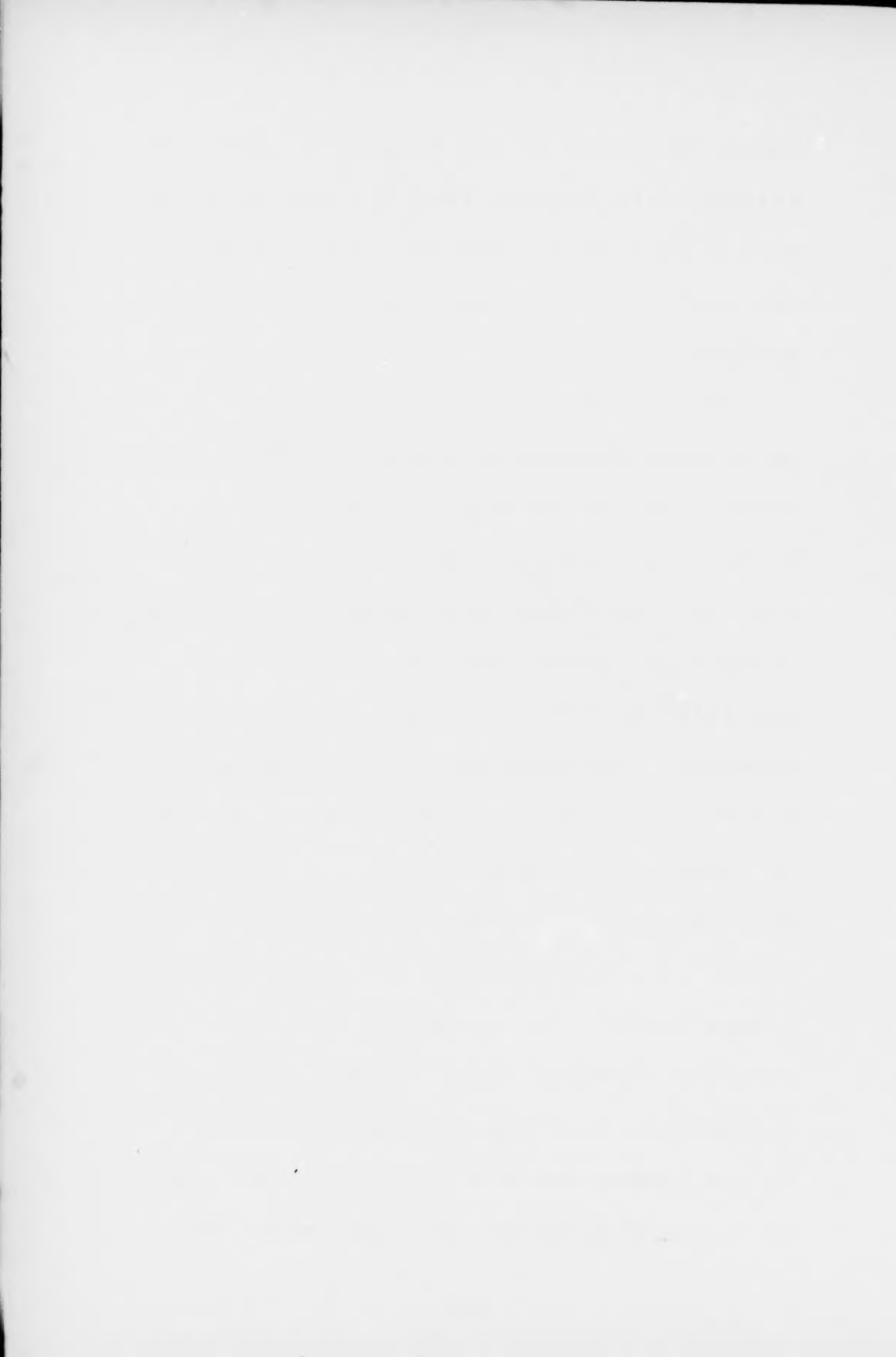
But this is not how things have worked out. As a practical matter, Interior and the Forest Service have administered the common varieties law almost as a prohibition against mining claims on the materials listed in Section 3. This is accomplished by imposing standards and tests which violate the intent and purpose of Section 3.

Senator Metcalf made an outstanding exposition of the manner in which the statute is frustrated by the unwarranted and arbitrary standards and tests applied by the administrative agencies. (Vol. 112, Cong. Rec. 12109-9, June 9, 1966.) I



subscribe fully to the Senator's views and respectfully request that his statement be made a part of the record. In line with his expressions let me cite stone as an example.

The correct test should be whether a particular deposit of stone is common stone. But as pointed out by Senator Metcalf this is not the test Interior applies. An individual files a claim on a deposit of travertine. Travertine is a beautiful marble-like stone. It is more expensive than many marbles. Clearly travertine is not a common stone. Neither is limestone a common stone. If Interior applied the test intended by Congress, it would ask, is travertine or limestone a common stone? The answer is apparent. But Interior does not apply the obvious test intended by Congress. Interior asks, is this a common variety of travertine? Is this a common variety of limestone? On



that basis Interior rejects the claims saying "Yes, these are common varieties of travertine, or limestone", as the case may be.

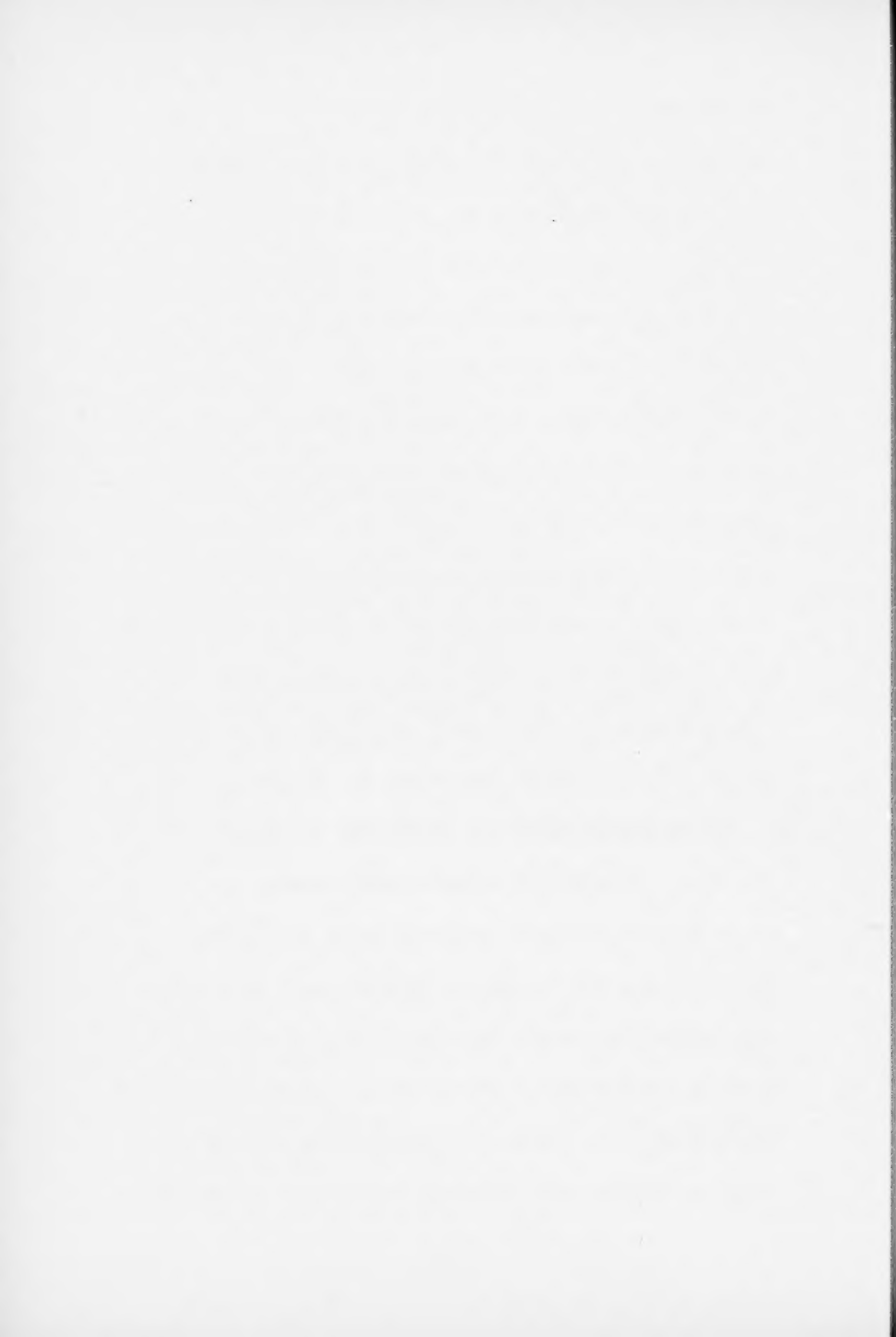
In the same fashion Interior administratively negates the exception in Section 3 which permits the location of deposits of the listed materials if such materials "are valuable because the deposit has some property giving it distinct and special value." House Report No. 730, 84th Congress, 1st sess. (1955), on the bill which became the 1955 Act. specifically refers to the language of this exception as excluding "materials such as limestone, gypsum, etc., commercially valuable because of 'distinct and special' properties". Nevertheless, Interior rules that "distinct and special value" does not mean value over and above that found in common stone, but rather means value over and above that found in stone of the particular



category. Again, using limestone as an example, Interior's view is that whether a particular deposit of limestone has "distinct and special value" depends on whether it has value over and above that found in limestone generally. In this connection Interior limits itself to intrinsic factors such as physical characteristics and chemical composition and excludes extrinsic factors such as location, accessibility, market and demand, all related to commercial value.

**STATEMENT OF JOHN B. AHERN,
VICE PRESIDENT OF MONTANA TRAVERTINE
QUARRIES, GARDINER, MONT.**

It is indeed unfortunate that the definition of "common varieties" has been the cause of much hardship within the mining industry. Many small producers have been coerced into relinquishing their rights under the mining laws and have been



forced to accept leases under the Material Disposal Law, which have, in effect, so restricted operations that they are practically out of business. These persons entered into leases because it was felt that, "You cannot fight the Government".

In addition to the problems presented by the interpretation of Public Law 167 and the definition of "common varieties", there are other problems that face the small mine operator in a dispute with a government agency, not the least of which, is money.

As stated above, many small operators have been forced to accept a leasing arrangement to lease the property in question under the Materials Disposal Law. The payments to be made under these leases are generally excessively high, and so restrictive as to the volume that may be produced under the lease, that the operator is unable to be competitive and thus must eventually get out of the building stone



business. In our case the suggestion was made that our royalty payment should be 5% of gross sales. In addition when we had paid the government \$1,000.00 in royalties during any one year we would be required to make a competitive bid on the property in order to retain the lease. This would mean that we would be restricted to a production of 750 tons of stone per year. Under this proposal we could never hope to recover our development costs which to date exceed \$20,000.00 on Happy Jack No.3.

I have discussed this problem with several stone producers and I have not found any two leases that are identical. Apparently leases are made on a basis of whatever the traffic will bear.

At no time did we consider a lease. We insist that we have a valid placer mining claim and that the Forest Service is in error in its interpretation of the common variety clause of Public Law 167.

When a dispute arises and a contest is started, through the process known as administrative procedure, the financial burden placed upon the miner is unbearable. In our case our lawyers estimated legal fees would be approximately \$11,000.00. In addition there would be travel expenses and expert witness fees. Frankly, gentlemen, the prospect of such unreasonable expenses had a strong influence on our decision to seek the aid of Congress to secure corrective legislation.

Referring to the hearing held in Washington on September 24, 1965, page 128, (Mr. Frank J. Barry described the administrative procedure as a "quasi-judicial proceeding". He cast the Forest Service in the role of an advocate with an attitude of hostility who would carry a case through a series of appeals to the Secretary of Interior. As Mr. Barry



stated, the Forest Service would take the case to court, "and the court is the Department of Interior". No small mine operator can afford to expend the sums of money required in such a so-called judicial process. As a matter of fact mining companies with large financial resources have the same problem as reported by Mr. E. B. Connors, representing Kaiser Cement & Gypsum Corporation at the hearings held in Butte on June 8, 1965, when he stated, on page 83, "we have spent 9 years and over a half million dollars on a project that has not yet gotten off the ground, due entirely to the manner in which our mining laws are being administered".

About two years ago Secretary Udall wrote to Congressman Olsen of Montana, and among other things, made the statement that in lieu of the relatively small cost of a hearing, the Montana Travertine Case should go to a hearing. I ask this question.



These small costs are relative to what? My assets, or the budget of the Department of Interior? Believe me, there is a real difference.

**STATEMENT OF J. R. HENDERSON,
PRESIDENT, LAS VEGAS BUILDING
MATERIALS, INC., LAS VEGAS, NEV.;
ACCOMPANIED BY VINCENT B. AHERN, JR.,
ASSISTANT MANAGING DIRECTOR OF
THE NATIONAL SAND & GRAVEL ASSOCIATION**

In an address at the 50th annual convention of the association, the Hon. John A. Carver, Jr., Under Secretary of the Interior, stated that the growth of the sand and gravel industry since World War II from 200 million short tons of annual production with a value of about \$120 million, to 370 million tons and nearly \$900 million, respectively, in 1965, has been, in his words, truly phenomenal. He said that when this record is matched

against the trend of the gross national product, it is clear that the sand and gravel industry has been a major contributor to the Nation's developing prosperity, "for you have outperformed the general economy by something like a third."

At the present rate of sand and gravel production in the United States, and assuming that production does not increase in response to growing demand, our industry will have to produce well over 25 billion tons of sand and gravel in the 30-year period from 1962 to 1992. I use this span of years because the American Society of Planning Officials estimates that in these 30 years, increased demand will mean that we shall actually have to produce 42 billion tons in order to provide the basic facilities for the expected population growth by 1992. By the year 2000, it is expected that our country's population will total 350 million persons. Great construc-



tion programs of all classifications will have to be undertaken and carried out.

When it formulated its program for natural resources development, the Fairfax County, Va., Planning Commission warned:

. . . gravel is a natural resource. Although it is commonly found and erroneously regarded as not valuable, it is an important and essential element to our economy and to our every day existence. Gravel is an unrenovable resource that should be used, and should not be lost forever by development on the surface of gravel deposits.

Sand and gravel: Whereas the demands of industry and of the public for high-grade construction aggregates are increasing by leaps and bounds in order to meet the expanded highway and other construction programs so necessary to our economic growth and well-being: Now, therefore, be it

Resolved, That the Western Governors' Conference urges that Congress amend existing law to permit the application of the general mining laws to deposits of sand and gravel which can be mined, processed, and marketed for use of high-grade construction aggregates.

The sand and gravel industry, then, faces some real problems in the future in

obtaining necessary reserve deposits. These problems have been compounded since 1955 by the interpretation of Public Law 167. Public Law 167 sought to exclude, among other minerals, "common varieties" of sand and gravel. The Bureau of Land Management of the Department of the Interior undertook to define the term "common varieties" to include all sand and gravel.

Since that time, the Bureau of Land Management has continually denied sand and gravel claims, and taken the position that they had no choice under the statute but to exclude sand and gravel even though this created a problem of desperate importance in the very States where so much of the land is under Federal ownership. Public Law 167 was intended to prevent the exploitation of public lands by unscrupulous speculators. The National Sand and Gravel Association shares the

Bureau's desire to make it impossible for anyone to exploit the public lands.

The exclusion of sand and gravel from patentability of lands in the Federal domain has created a serious economic problem in the Western States. As of 1964, the Federal Government owned 86.9 percent of the land in Nevada, and in Clark County, Nev., 98.94 percent of the land. While this is by far the largest ownership of Federal land in any Western State, other Western States are also finding themselves in serious difficulty in respect to the availability of sand and gravel of suitable quality for use in their construction programs.

For example, Federal ownership of land in Utah is 69.1 percent; in Idaho, 64.8 percent; in Oregon, 51.1 percent; in Wyoming 48.4 percent; in California, 44.9 percent; in Arizona, 44.7 percent; in Colorado, 36 percent; in New Mexico, 34.9



percent, and in Montana and Washington, over 29 percent.

MR HENDERSON. The country must be aware of the fact that if sand and gravel is to be made available to the public, responsible producers must have access to lands in the public domain in the Western States. Sand and gravel must today not only meet rigid specification requirements, but also must be available at reasonable cost, which means that sand and gravel must be mined reasonably close to the construction market, since transportation is the most important cost element in sand and gravel prices.

**STATEMENT OF DR. DONALD K. SHIELDS,
BREA, CALIFORNIA**

It does not seem to me, however, that common varieties is the most basic issue here. The usage of land acquired under mining locations law appears to me to be the basic issue.

And I would simply sum up what I would feel the solution to this would be: To have broad and liberal definitions of locatable minerals, be they common mineral or common material, the common varieties I believe we referred to them as. This would include all of the minerals used in industry, construction, and including decorative purposes, including all other previously mentioned usages, too. And to insure the proper usage of mining land, I would suggest that effective measures to insure the devotion of lands acquired by mining claim or patent under mining location laws be enacted to insure their devotion to mineral production.

**STATEMENT OF WILLIAM KESSLER,
ARIZONA GYPSUM CORP.**

It seems to me to be unnecessary to have additional legislation in order to solve the common-varieties problems with

respect to gypsum, but if that is what it takes, if we need to do more than just spell it out, if we need to draw pictures than I heartily endorse Senate bill 3485, which I believe does this. We have also been given much written support of our position that gypsum is not a common variety of mineral.

It has been spoken of many times in the Congressional reports that accompany Public Law 167. There have been many pamphlets, regulations and publications published by the Department of the Interior and almost without exception, they have clearly stated that gypsum is a locatable mineral, and, in fact, I have a letter which is dated June 26, 1964, and it was addressed to Mr. Edward Cliff, Chief of the Forest Service, Department of Agriculture, in Washington, and it is signed by Mr. Charles Stoddard, Director of the Bureau of Land Management, and I will quote two paragraphs as an excerpt from that letter.



Mr. Snell, being the witness who just appeared before you, was a representative of the Gypsum Association. We are not a member of the association, but the reference in this letter is to Mr. Snell of the Gypsum Association:

Mr. Snell was advised that it was the position of the Department of the Interior and of this Bureau that gypsum was a locatable mineral and that a common varieties charge in a complaint is tantamount to a charge by the United States that the material claimed is not gypsum or is not primarily valuable for its incidental gypsum content. However, the patent application--

Referring to Arizona Gypsum's patent application--

the engineer's field report and the contestee's answer all describe gypsum deposits as the basis for the claims.

Now, upon receiving a copy of this letter, I was highly elated and I thought finally after 4 years that we had the problem solved and that the Forest Service would capitulate so to speak.

However, such was not the case. I would not imagine then how any further stumbling blocks could be thrown in our path or how one could then say gypsum was not gypsum; but I now read a memorandum dated December 15, 1965, which says just that, and I will quote it. This is a memorandum from Mr. Smith, Assistant Regional Forester to Mr. Richard L. Fowler, attorney in charge. Mr. Fowler is attorney for the U.S. Department of Agriculture at Albuquerque. I will read two paragraphs as an excerpt from the memorandum:

In our opinion, the claims are chiefly valuable for the gypsum which occurs for the most part as salenite crystals in siltstone and clay stone, therefore, we cannot say that the material claimed is not a gypsum or that the claims are not primarily valuable for the gypsum contained therein.

I will come to his conclusion after he has said it is gypsum:

The gypsum occurring on the subject claims must be concentrated, this concentrate is now being used for only one purpose, namely as a

retarder in portland cement. This does not require a highly pure gypsum and the product contains impurities of clay stone and siltstone. Accordingly, the product produced is not gypsum in the true sense of the word, but it is principally valuable for the gypsum contained therein.

MR. KESSLER. I might complete this comment by saying that the attorney at Albuquerque received this memorandum and also the letter from the Department of the Interior, and for some unknown reason he was unable to decide then that gypsum was gypsum and grant us our patent on this property.

I think perhaps the reason he did so was because we were advised by the local mining engineer who investigated our property for the Forest Service and also by his chief at Albuquerque that the claims had originally been recommended for patent.

We were then advised that we were to be used as a guinea pig, as a test case, to determine whether or not the gypsum could



be construed as a common variety, and for that reason I was glad to hear the Senator from Colorado's comments about who pays the attorney's bills for appearances before the Bureau of Land Management.

MR. KESSLER. Mr. Tragett. I also was advised that it was originally recommended by Mr. Tragett. However, that was not to me personally. It was to our geologist. But I would like to just close by saying that, while we feel the law clearly has specified that gypsum is a locatable mineral, while we feel the regulations have been clear in that respect, if it must be left to the discretion of an ill-advised or perhaps an ill-informed or an innocently wrong attorney at Albuquerque, that if he is given such discretion then I believe we should clarify the law, and that is the reason that I support this change.

I am sure you do not wish to handicap any enterprising, ambitious, basic



producer, basic prospector-businessman, and I am sure that you realize that the materials that we are dealing with, gypsum and these other nonmetallics, are the very foundation of the house we live in and the building we are standing in now, and to handicap the individual entrepreneur such as myself leaves us at the mercy of these ill-advised personnel. So I would heartily solicit the recommendation of this subcommittee that Senate bill 3485 be passed.

Senator GRUENING. Senator Metcalf?

Senator METCALF. I have no questions.

Senator GRUENING. Mr. Greeley, I think this is an important point. If we can have a decision that gypsum is not gypsum, where does that leave the industry in any respect if it can be decided that a locatable mineral is not what it is said to be? What guarantee and what sure test do the mining people have? This is an



extraordinary decision as presented by this witness.

Mr. GREELEY. This, I must confess, leaves me gasping.

Mr. KESSLER. I would hope that I could make an appointment with you before I leave Washington and perhaps we could get to where the trouble is here.

Mr. GREELEY. How is a quarter to two today?

Mr. KESSLER. That is fine.

Senator GRUENING. I think this spirit of cooperation is a very happy concluding note for this hearing.

(5)
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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1984

ROBERT L. MENDENHALL, Petitioner,

vs.

THE UNITED STATES OF AMERICA, ET AL.

From the United States Court of Appeals
for the Ninth Circuit

**PETITIONER'S REPLY TO RESPONDENT'S
BRIEF IN OPPOSITION**

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RESPONDENT'S QUESTION

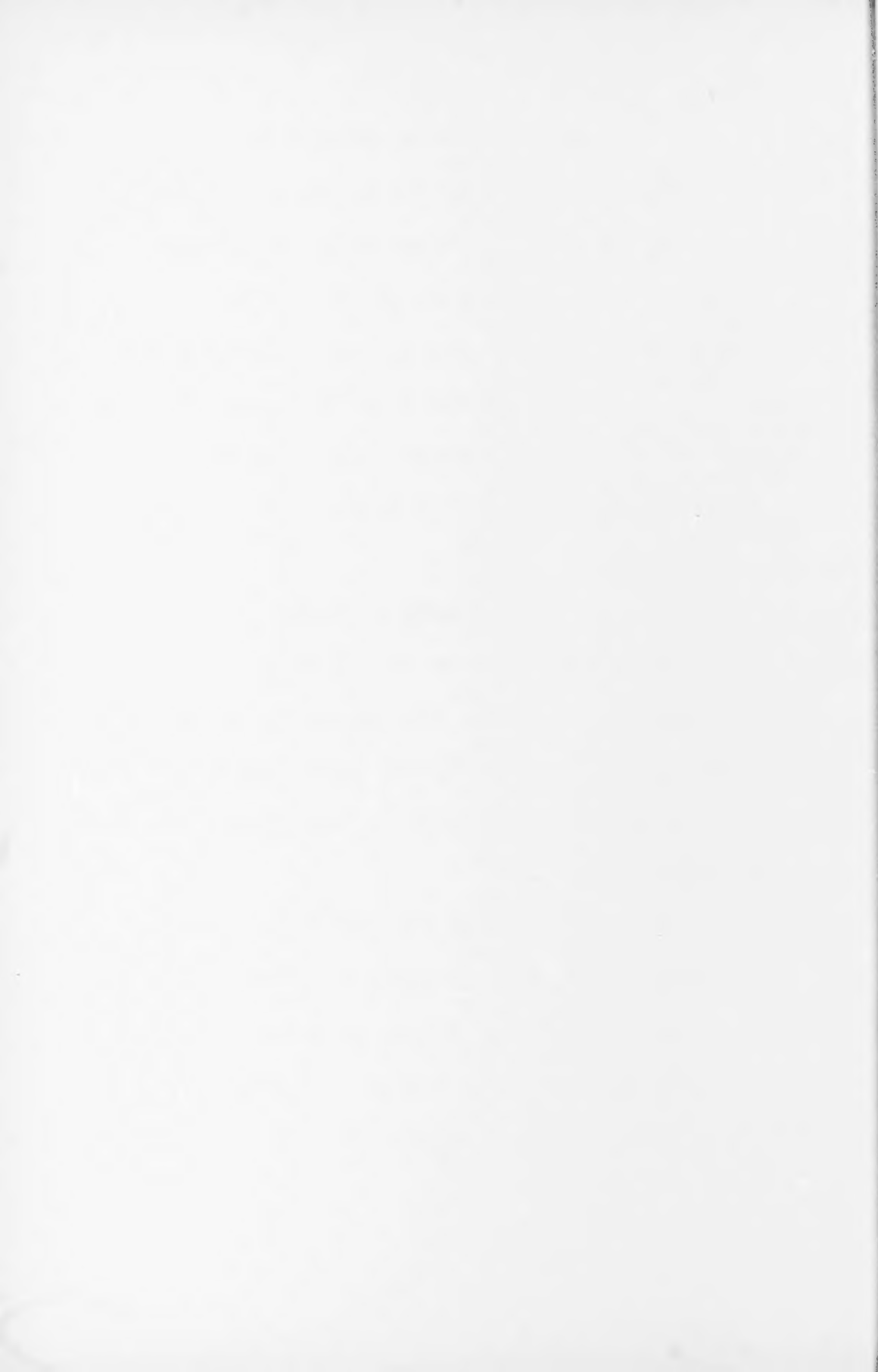
Whether the courts below correctly refused to overturn the agency's prior finding that, as of July 23, 1955, petitioner's sand and gravel mining claims were not supported by the "discovery" of a valuable mineral deposit as required by the Mining Law of 1872, 30 U.S.C. 22.

PETITIONER'S REPLY

The courts below erred when they refused to overturn the agency's prior finding of invalidity of Petitioner's mining claim and thereby misapplied the law in that:

(a) The enactment of the Surface

Resources Act on July 23, 1955 did not change the right of a citizen to locate a mining claim for sand and gravel, etc. in good faith.



- (b) Mineral discovery sufficient to validate a mining claim need not be a marketable mineral deposit as of any date.
- (c) Respondent in its Brief in Opposition to the Petition for writ of certiorari argues the propriety of Petitioner's writ rather than the substance of the legal issue.



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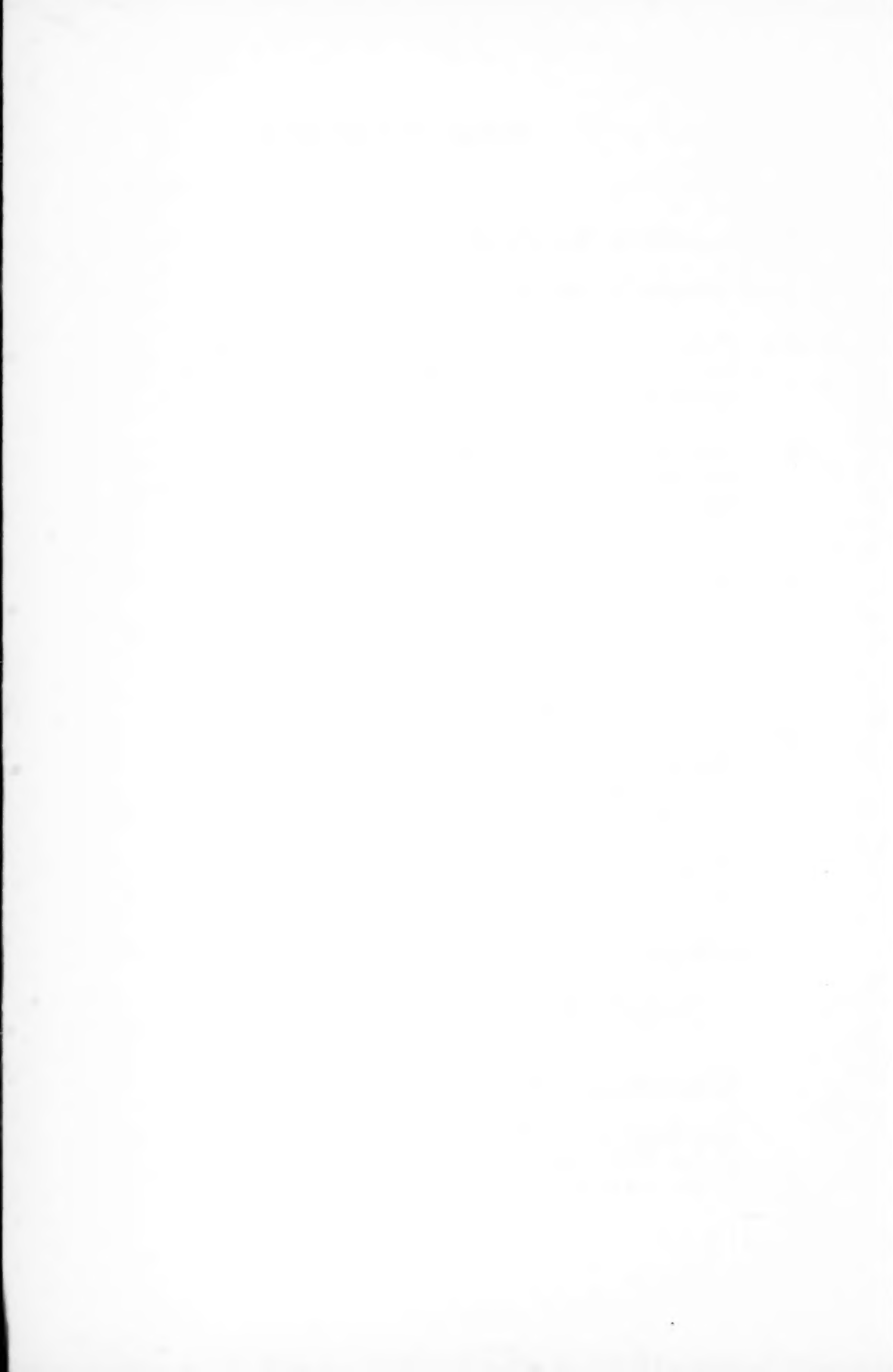
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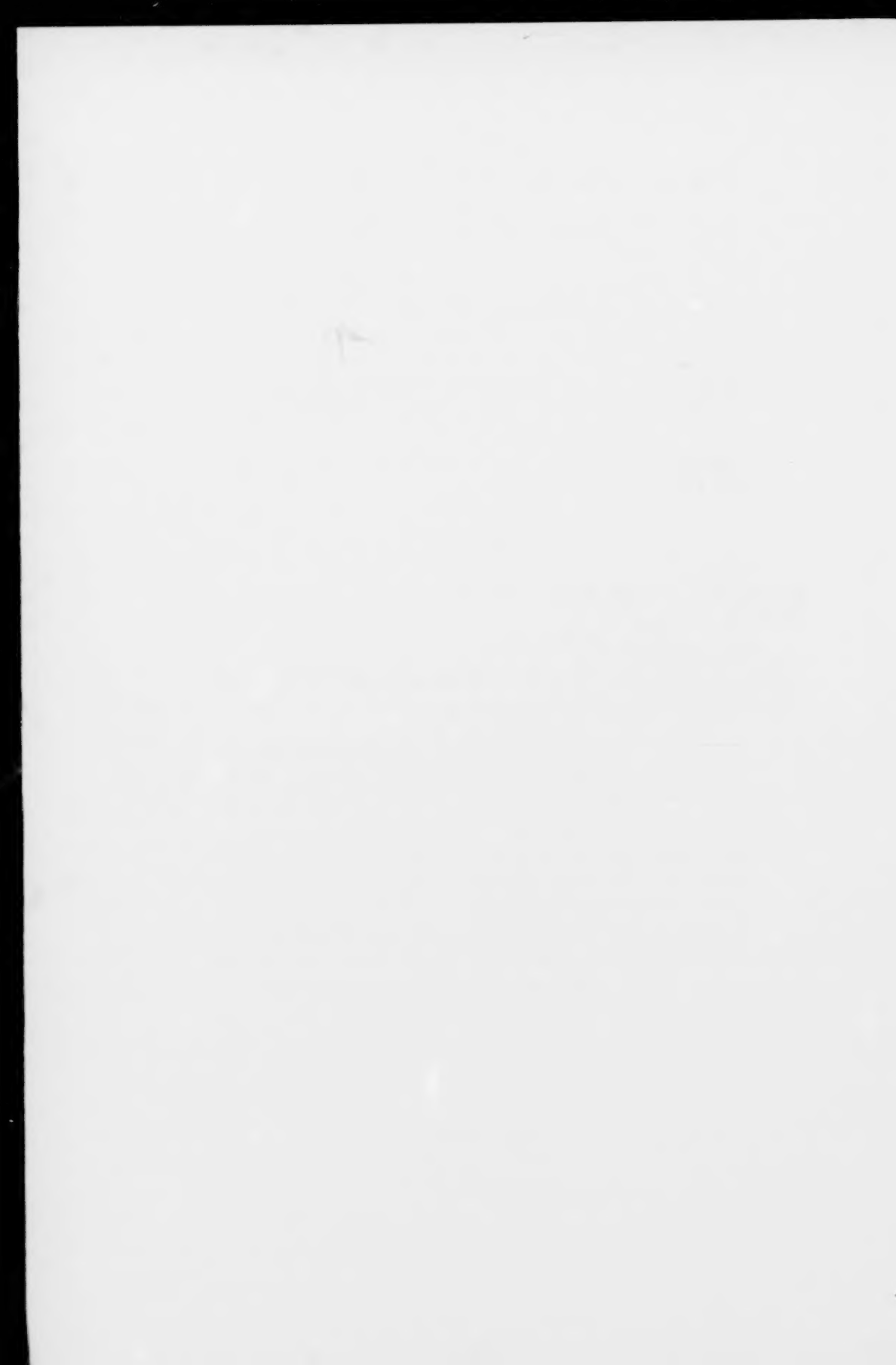


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<u>U.S. v. O'Leary, et al., 63 L.D.</u>	
<u>341 (1956).....</u>	16
<u>U.S. v. L.A. Tucker Truck Lines,</u>	
<u>Inc., 344 U.S. 33, 37, (1952).....</u>	12
<u>Webb v. U.S., 9th Circuit No. 79-</u>	
<u>3484.....</u>	13

Other

<u>Lindley on Mines, third edition Section</u>	
<u>336 3</u>	
<u>1966 U.S. Senate Hearing, Sub-committee</u>	
<u>on Minerals, etc.....</u>	1

Common Varieties Act Amendments,
 Legislative Purpose of Public Law
 167 (30 U.S.C.A. 611). June 28,
 1966 Hearing before the Subcom-
 mittee on Minerals, Materials, and
 Fuels of the Committee on Interior
 and Insular Affairs, Senate, 89th
 Congress, 2nd Session on Bills to
 Amend Section 3 of the Act of July
 23, 1955 (69 Stat. 367, 368).



IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1984

No. 84-718

ROBERT L. MENDENHALL, Petitioner,

vs.

THE UNITED STATES OF AMERICA, ET AL.

**From the United States Court of Appeals
for the Ninth Circuit**

**PETITIONER'S REPLY TO RESPONDENT'S
BRIEF IN OPPOSITION**

STATEMENT SUPPORTING PETITIONER'S REPLY

(a) The enactment of the Surface Resources Act on July 23, 1955, did not change the right of a citizen to locate a mining claim for sand and gravel, etc. in good faith.

On June 28, 1966 a Hearing was held before the Subcommittee on Minerals, Materials, and Fuels of the Committee on Interior and Insular Affairs. The record



of that hearing, excerpted in the Appendix to the Amicus Curiae filed in support of Mendenhall's Petition, clearly expresses the idea that the Surface Resources Act does not change the rights of bona fide mineral entrymen to locate mining claims. There are no statements in the record contrary to this interpretation.

Senator Gruening (Amicus App. 42):

. . . "In no way would it deprive them of rights and means for development of the mineral resources of the public lands of the United States . . ."

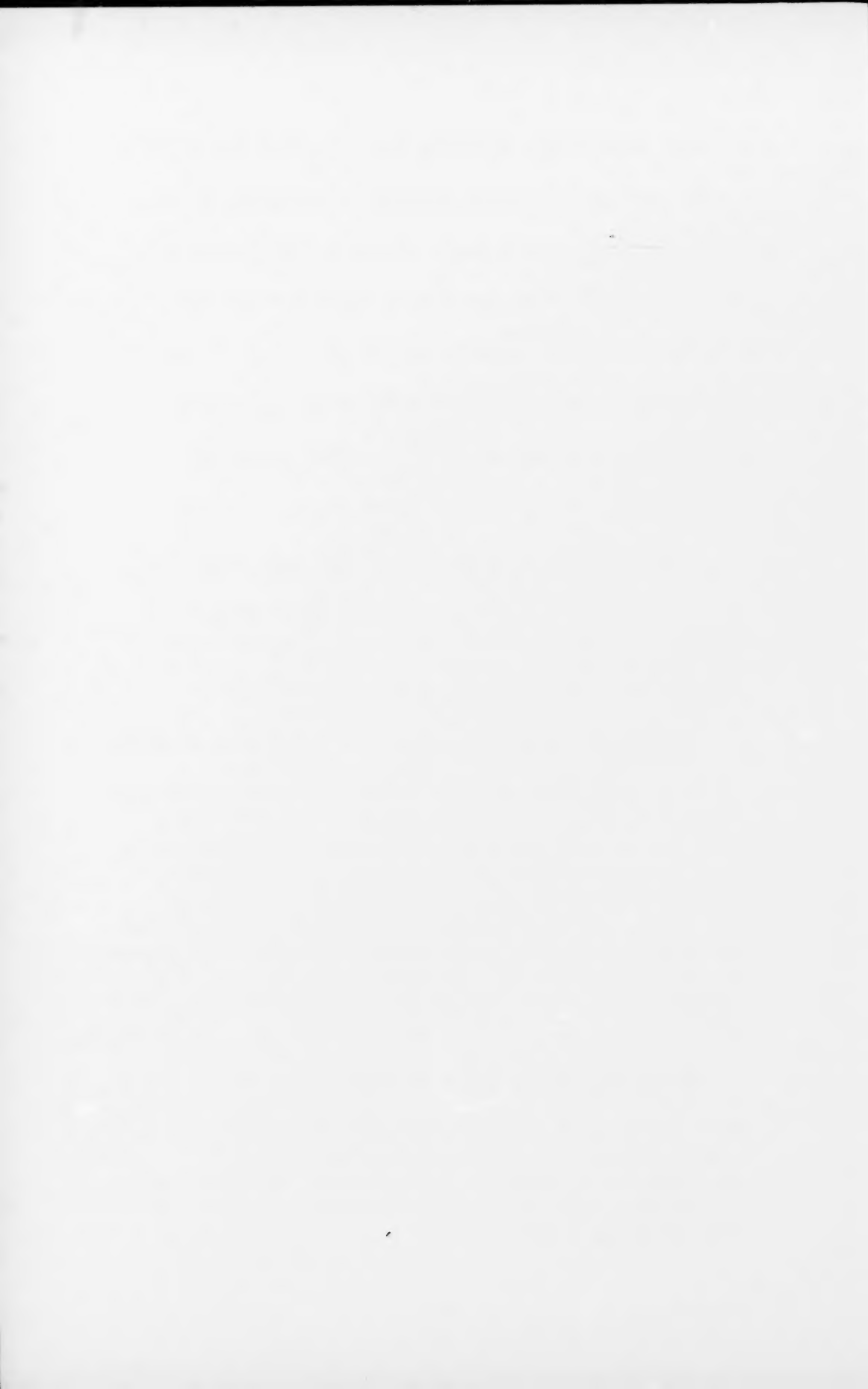
Senator Cannon, (Amicus App. 44 & 45):

. . . The Department of Interior has consistantly held in recent years that all sand and gravel and similar deposits are of a common variety. . .

. . . the adoption of this position by the Interior Department, in my opinion, clearly ignores the intent of Congress at the time it passed Public Law 167. . .

Senator Metcalf (Amicus App. 61):

Not only did we intend to, but we admonished both the Secretaries of Agriculture and Interior that we intended to carry out the traditional intent of the mining law.



Also see the testimony of Senator Moss (Amicus App. 50) and Senator Bible (Amicus App. 67).

(b Mineral discovery sufficient to validate a mining claim need not be a marketable mineral deposit as of any date.

No court has ever held that in order to entitle a citizen to locate a mining claim, ore of commercial value, in either quantity or quality, must be discovered. Such a theory would make most mining locations impossible: Lindley on Mines, Section 336. See Book v. Justice Mining Company, 1893, 58 Fed. 106; East Titanic Consolidated Mining Claim, 40 L.D. 271; Jefferson-Montana Copper Mines Company, 41 L.D. 320; U.S. v. Mobley, 45 F.Supp. 407; Nevada Sierra Oil Co. v. Home Oil Co., (1899), 98 Fed. 673; Madison v. Octave Oil Co., 99 Pac. 176; U.S. v. M.W. Mouat et al. (1954) 61 I.D. 289; Ohio Oil Co., A-26479 (1953).

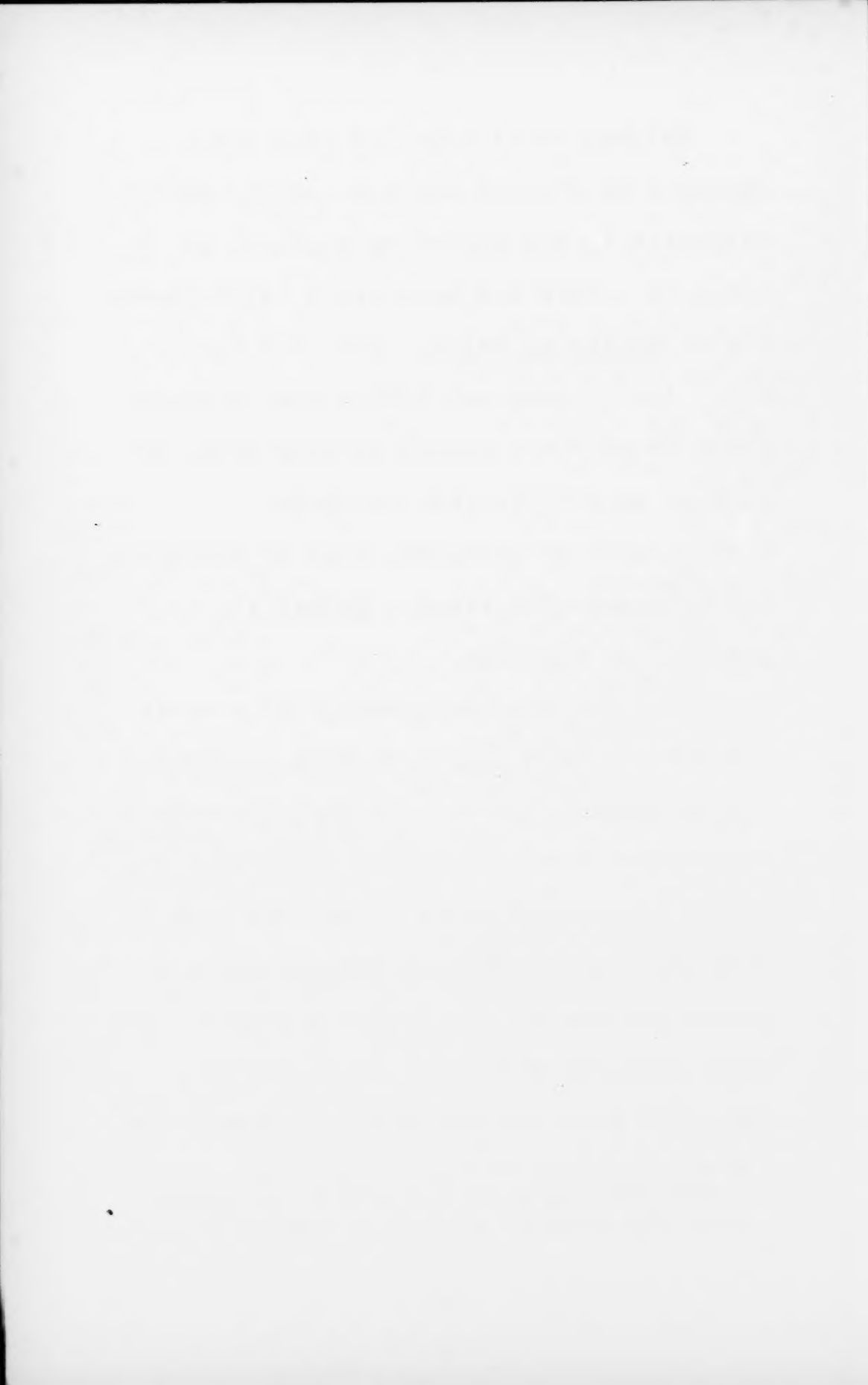


Neither is it required that the deposits of mineral shall be sufficiently extensive to pay operating expense, in order to locate and maintain a valid placer claim: Murray v. White, 1911, 113 Pac.

754. And it does not follow that because there is no clear profit arising from the sale of an article that has been manufactured or produced, that it therefore has no commercial value. Narver v. Eastman, 34 L.D. 123.

What are the requirements of a valid discovery? In the case of Book v. Justice Mining Company, supra, the cost of removal of porphyry copper was testified to at length by experts in an attempt by Book to show that Justice Mining Company could not remove and market the ore at a profit. The Court held the discovery valid and explained with the hypothetical case below.

A vein or lode of quartz or other rock in place bearing gold and silver is found upon the side of a hill or mountain. It



is within well defined walls, and the rock assays from \$1 to \$15 per ton. The cost of extracting, removing, and milling the ore is \$20 per ton. The miner making the discovery is aware of this fact; but he knows, or has good reason to believe from his own knowledge, gained by years of experience, that, within or along the veins or lodes of that particular district, places are liable to be found that may prove to be of much greater value, and that the ore is liable to be richer at a greater depth than it is upon the surface. Now, the provisions of the mining laws, that a person making the discovery -- a discovery which in good faith, induces him to locate the vein or lode, and commence the running of a tunnel into a hill or mountain for the purpose of properly working and developing the ground, and complying with all of the provisions of the law, after he has expended thousands of dollars in labor and improvements upon the same -- can be deprived of his location by the fact that other persons, subsequent to his discovery and to his location, went up the hill 500 or 1000 feet distant from the place where he had found and prospected the lode, but within the limits of his location, and then by sinking a deeper shaft upon the same lode, found ore which assayed over \$40 per ton, -- enough to ensure a profit to the owners, -- and thereupon located the ground? This may be an extreme case, but it fairly illustrates the theory, for according to the testimony of several of complaintant's witnesses the latter location would be valid and a prior location invalid. The Act of Congress is susceptible of no such construction. It does not impose any conditions as to the



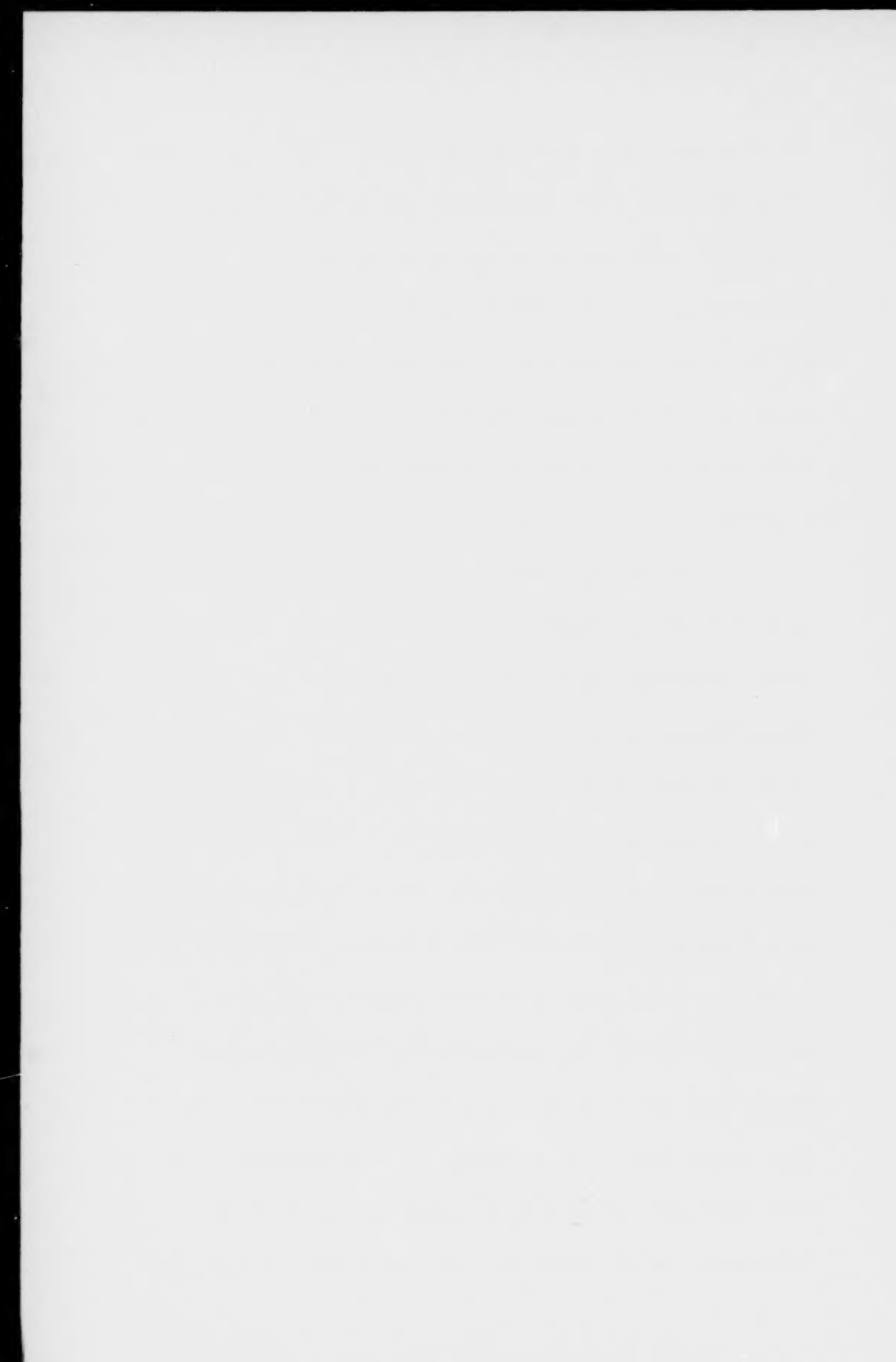
value or the extent of the ore. It simply provides that no location of a mining claim shall be made until the discovery of a vein or lode within the limits of the claim located."

The Respondent's "marketability test" is a bag of tricks from which agencies administering federal lands have drawn to persecute and eliminate small miners and free enterprise from the public domain. The elements effecting a market are infinite in number and by carefully choosing a limited set of market factors, it is possible to prove that anything is not marketable. Respondent's use of this magical test has defeated the spirit of the mining statutes and the construction given them by the courts. Under Respondent's administration of the laws since the passage of the Surface Resources Act of 1955, a prospector must find a paying mine before he can locate his claim; thus, the "marketability test" has paralyzed mining



in the western United States. Yet, the act of 1955 was not intended to affect in any way the laws governing mining claims located prior to 1955, and those located after the passage of the act are affected only in so far as that Act provides for the limitation of a mining claimant's surface rights.

In view of the fact that the charges against Petitioner's predecessor, Sullivan, were brought upon the recommendation of Government mineral examiners who believed that evidence of a commercial operation on the claims prior to July 23, 1955, was necessary to validation; and the fact that the Respondent held the claims invalid because Sullivan did not show that the deposit could be extracted, removed and marketed at a profit; it is apparent that the true test of a discovery necessary for the validation of a mining claim - the "prudent man" test as enunciated in Castle



v. Womble, 19 Pub. Lands Dec. 455) and approved in the Chrisman v. Miller, 197 U.S. 313; Cameron v. United States, 252 U.S. 456; Rawls v. U.S., 566 F.2d 1373, (9th Cir. 1978); Baker v. U.S., 613 F.2d 224 (9th Cir.), cert. den. 449 U.S. 932 (1980); and U.S. v. Coleman, 394 U.S. 907 was not applied.

In so far as the cases above support Departmental requirements of marketability, they are in error. The continuing application of this incorrect rule, which is patently prejudicial, requires the relief sought by bona fide miners as a matter of law.

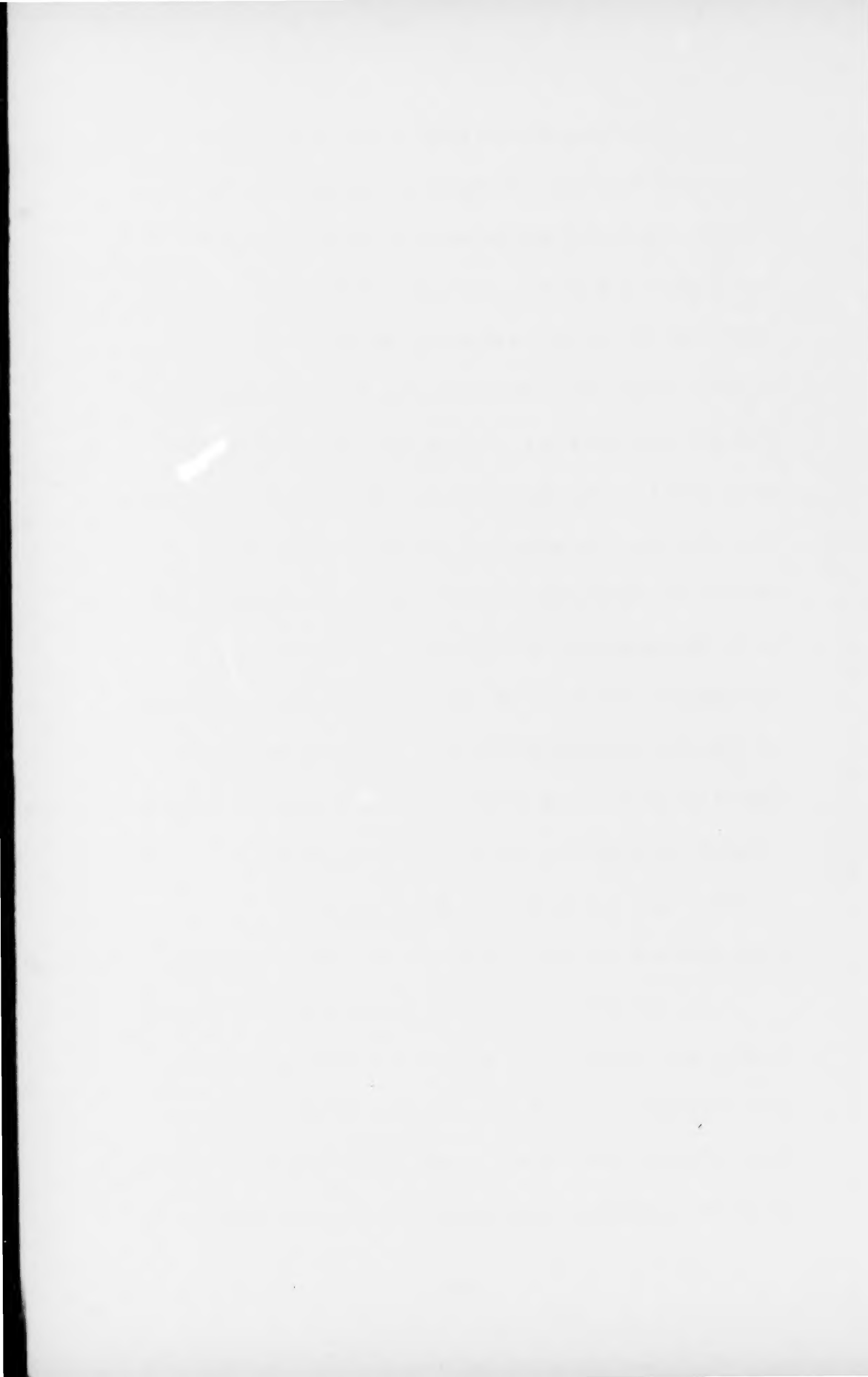
(c) Respondent in its brief in opposition argues the propriety of Petitioner's writ rather than the substantive legal issue.

In the Brief in Opposition, Respondent misrepresents the facts by relying totally



on the Hearing Examiner's opinion rather than the factual evidence submitted at the Bureau of Land Management (BLM) hearing. The Court is most likely left with the impression after reading Respondent's brief, that the mining claims in question are of peripheral value or valueless and that Sullivan, Mendenhall's predecessor on the claims, presented no evidence of a valuable mineral deposit at the Bureau of Land Management hearing. Therefore, presentation of the transcript cannot wait to be forwarded with the record upon the Court's granting writ of certiorari. It's length not being prohibitive, the transcript of U.S. v. Sullivan is reproduced as an appendix to this reply.

To briefly correct Respondent's Statement, we refer the court to the appendix for correction of the facts listed below. Petitioner believes that the scope of these errors clearly indicates that the BLM



Hearing Examiner is not the independent, quasi-judicial officer required by the Administrative Procedure Act, but rather an advocate himself for Respondent's policy of nullifying the mining laws:

(1.) Nowhere did Sullivan "stipulate" (Statement, page 2) that the limestone aggregate on his mining claims was a "common variety". On the contrary, he testified that it was of uncommon value: Appendix 78-79. Furthermore, the term "sand and gravel" is a loosely used term which can be of no legal significance. See Appendix (App.) 27-31, 81, 90.

(2.) In the absence of any higher purpose for the contested property (App. 35), evidence on record supports the fact that the limestone aggregate (generally called "sand and gravel" in the hearing) had been mined from the area of the claims prior and during Sullivan's ownership of the claims: App. 10, 26, 78-79, 82, 86.



(3.) Contrary to the Brief in Opposition (pages 7-8), a portion of the limestone aggregate deposit being mined by Petitioner overlaps onto Charlestone Stone Company's patented claims: App. 68, then 58, 63, 76, 83, 85, 88.

(4.) The Hearing Examiner's denial of any removals of mineral from the claims (Pet. App. 38) takes no cognizance of the probability that evidence of mining is erased in the deltas at the mouth desert canyons: App. 66-67, 72-74, 81, 88-99, 104.

(5.) The aerial photograph presented at the hearing does not support the conclusion that no mining had taken place on the property: App. 61, 66-67.

(6.) The Hearing Examiner relies upon the mineral examiner's legal opinion as to marketability even though that opinion (App 45) does not address the market criteria to which Sullivan testified (App. 99) and which eventually proved important to the present mining operation: App. 45, 99.



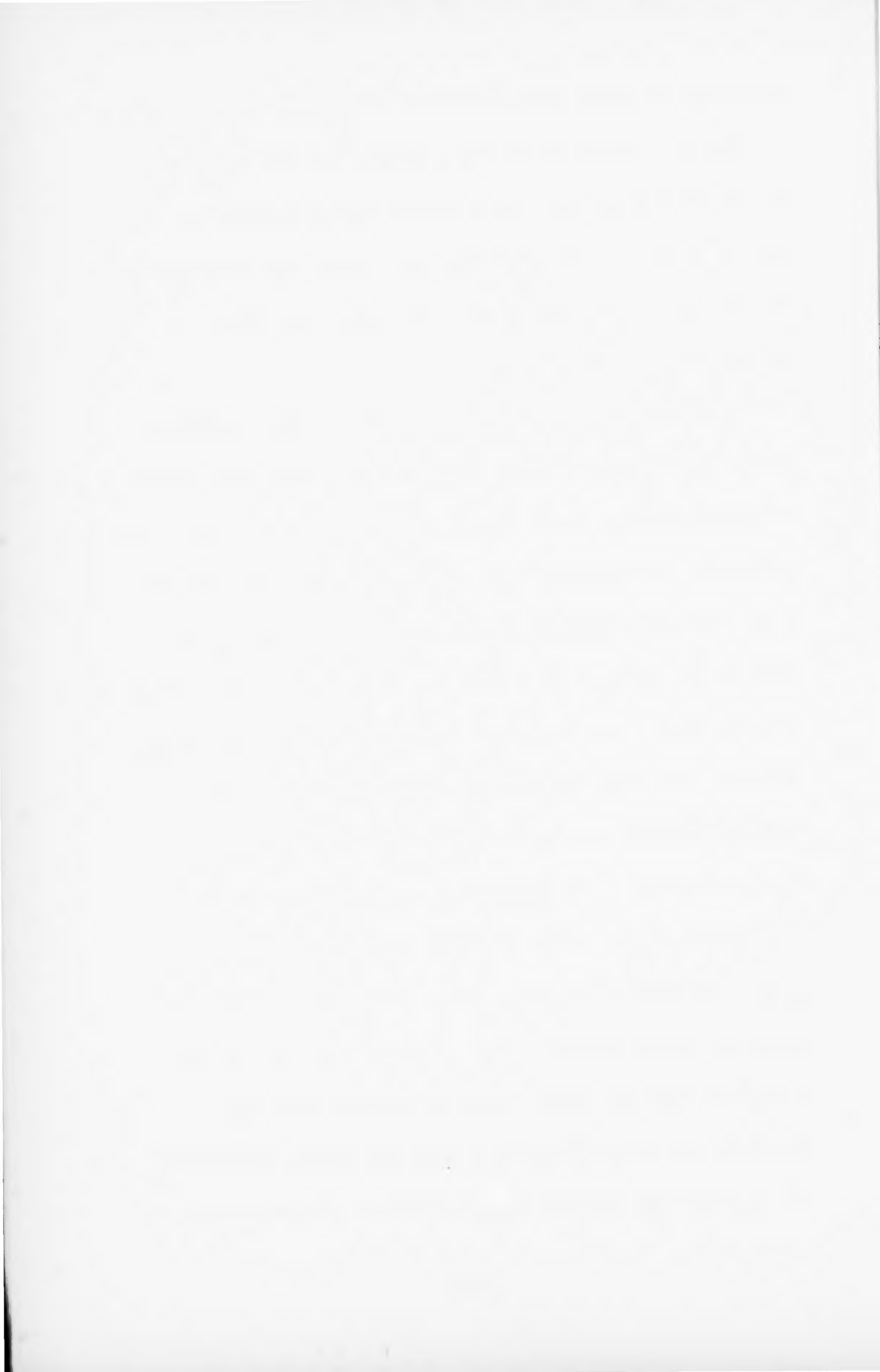
In light of the many questionable representations of fact in the Hearing Examiner's decision, it is clear that the evidence has never been heard by an impartial quasi-judicial body. Nor has the evidence been reviewed by a court unconstrained by the unjustified acceptance of the discretion of an agency which has defeated the stated purpose of the mining laws.

In addition many of the procedural cases which Respondent uses in its opposition to the petition are immaterial. U.S. v. L.A. Tucker Truck Lines, Inc. (Tucker), 344 U.S. 33, 37 (1952) does not forbid Petitioner from raising the substantial evidence question before this Court. The administrative hearing appealed from in Tucker, supra, was initiated as the result of an application by Tucker and procedural limitations were implicit to that application. The contest against Petitioner's

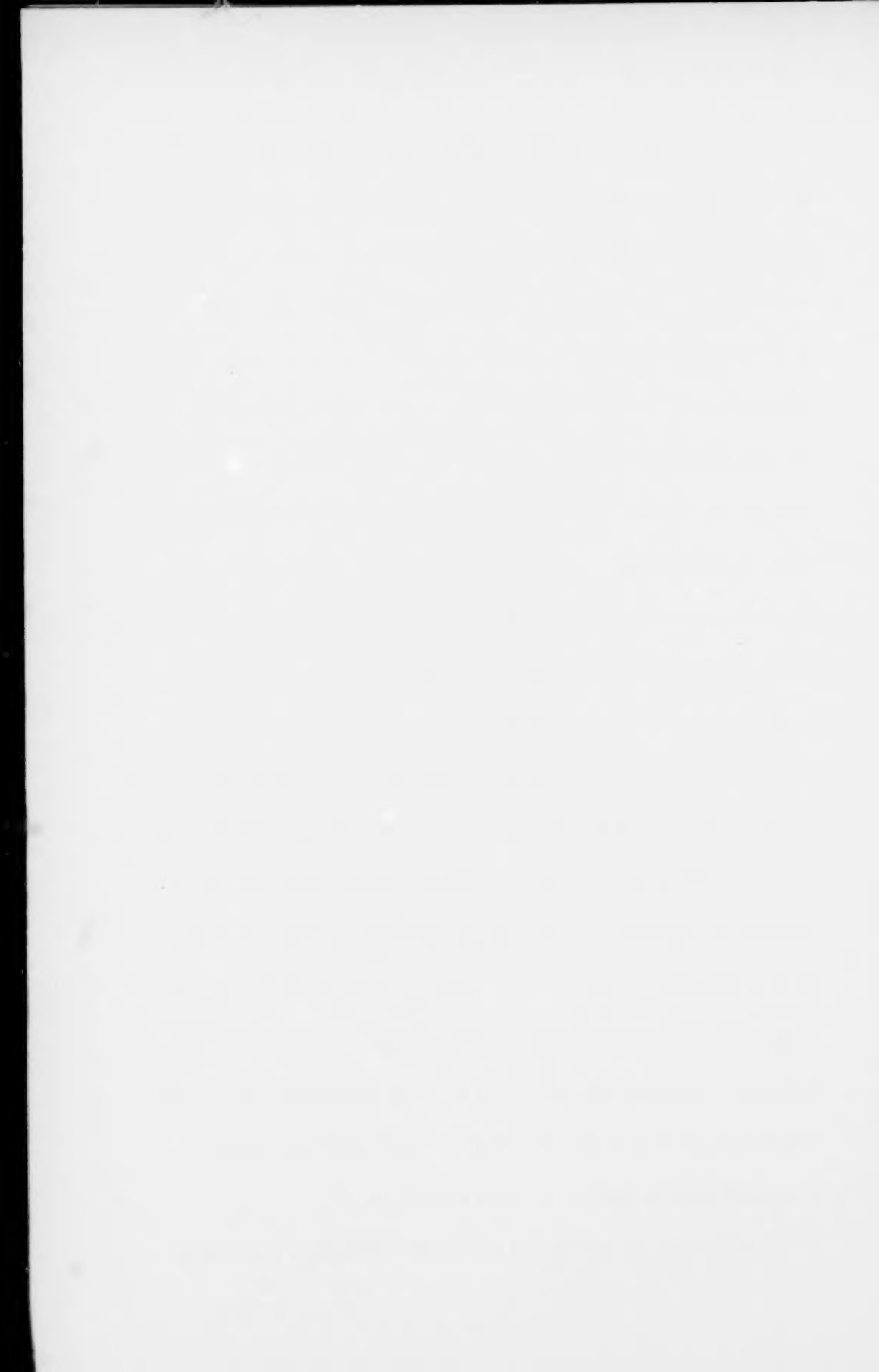


mining claims originated from no instrument of Petitioner himself, such as an application for patent, but from Respondent's policy of invalidating all mining claims in an area with the goal of leasing the mineral (Amicus App. 72-73).

Respondent policy in the administration of the Surface Varieties Act has been "fraudulent, arbitrary, capricious" and "so grossly erroneous as necessarily to imply bad faith", Crown Coat Front Co. v. U.S. 386 U.S. 503, 18 L ed 2d 256, at 256. The statutory limitation imposed in Crown Coat, supra, to the Court's right to review administrative decisions is immaterial. Furthermore, in Coleman v. U.S., Ninth Cir. Ct., 390 U.S. 599 (1968) and in Webb v. U.S., Ninth Cir.Ct., No. 79-3484, the courts have ruled that there could be no limitation to the time allowed for an appeal to the Courts from an invalidation of a mining claim by Interior Department.



In D.C. Transit System, Inc. v. Washington Metropolitan Area Transit Commission (Washington Metro), 466 F.2d 394, 404 (D.C. Cir.), cert. denied, 409 U.S. 1086 (1972), the Court ruled that "an essential ingredient of the aggrievement standard is adversity flowing from the order sought to be reviewed". The Court was satisfied on the District Court level that no adversity whatsoever was wrought to petitioner therein, Diana K. Powell. Powell, who inaugurated the case, opposed an increase in transit fares and urged lowering of existing fares at a preceeding before the Washington Metropolitan Area Transit Commission upon an application by D.C. Transit System, Inc. The Court held that "decisions by the administrative fact finder based on credibility determinations should not be upset by a reviewing court except when made irrationally." Mendenhall's adversity does flow from the



decision of the BLM Hearing Examiner, but that decision made no "credibility determinations" as to the mining claimant's good faith. That decision skirted the credibility issue with the bogus issue of whether the mineral deposit was marketable.

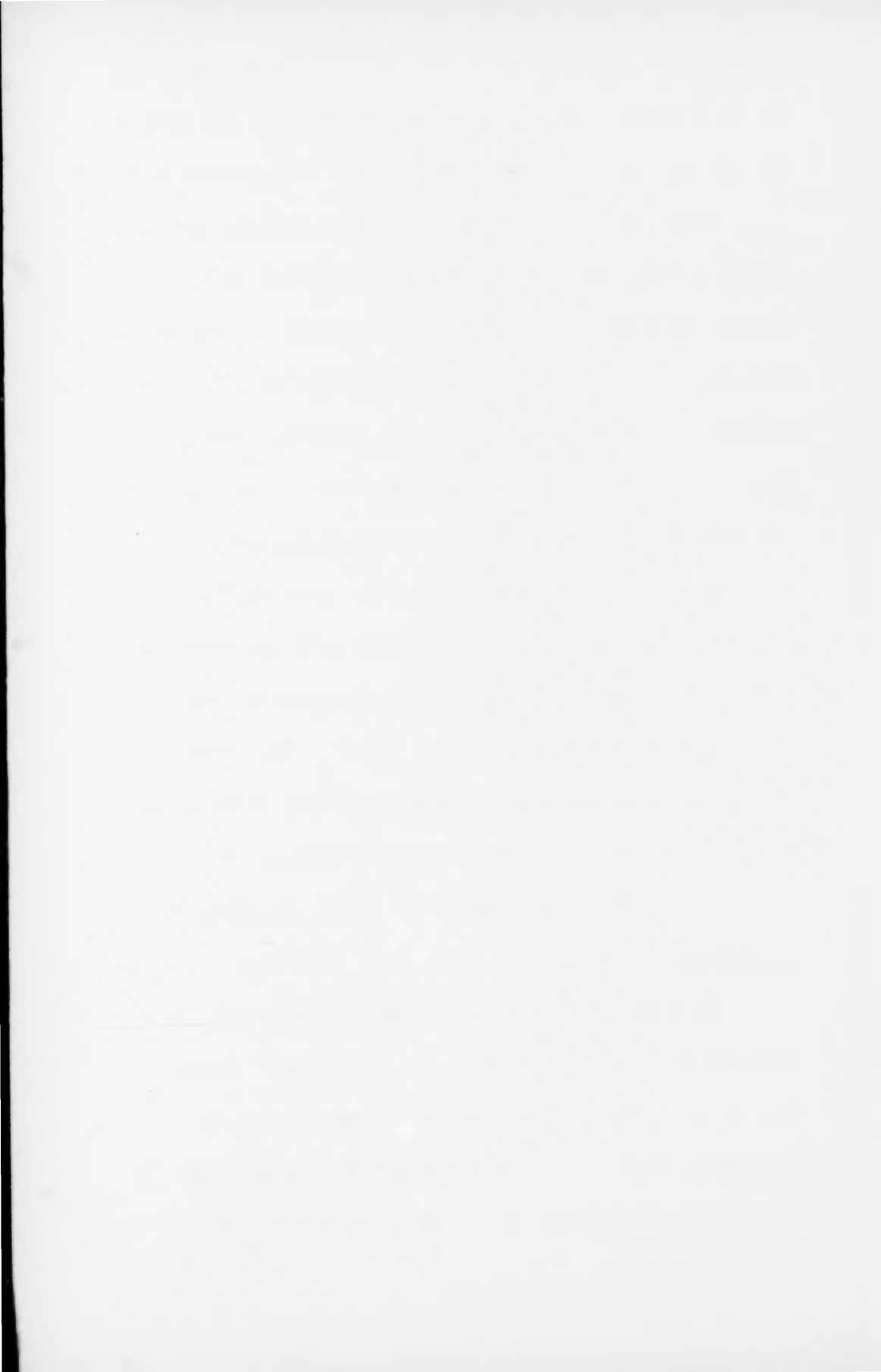
As in Crown Coat and in Washington Metro supra, Respondent's use of Goldberg v. Kelly, 397 U.S. 254, 270 (1970) is equally oblivious to the substantial differences between the claim against the Government in the cited cases and a mining claimant. In Goldberg v. Kelly the termination of welfare payments was being contested. The District Court held that only a pre-termination evidentiary hearing would satisfy due process requirements. This Court would not allow such an interpretation of due process and ruled that "orderly procedure and good administration require that objections to the proceedings of an administrative agency be made while



it has opportunity for correction, in order to raise issues reviewable by the courts."

For Respondent to compare welfare termination and its administration by Secretary Goldberg to the invalidation of a mining claim made in good faith is preposterous. Petitioner and his predecessor, Sullivan, have made substantial investments in the mining claims which Respondent wishes to seize, investments (Appendix 5, 36, 70, 72-76, 81, 89) which are protected and encouraged under the property right provisions of the mining laws. Furthermore, unlike welfare termination, hearings are procedurally required in cases of mining claim invalidation, U.S. v. Keith O'Leary, et al., 63 L.D. 341 (1956).

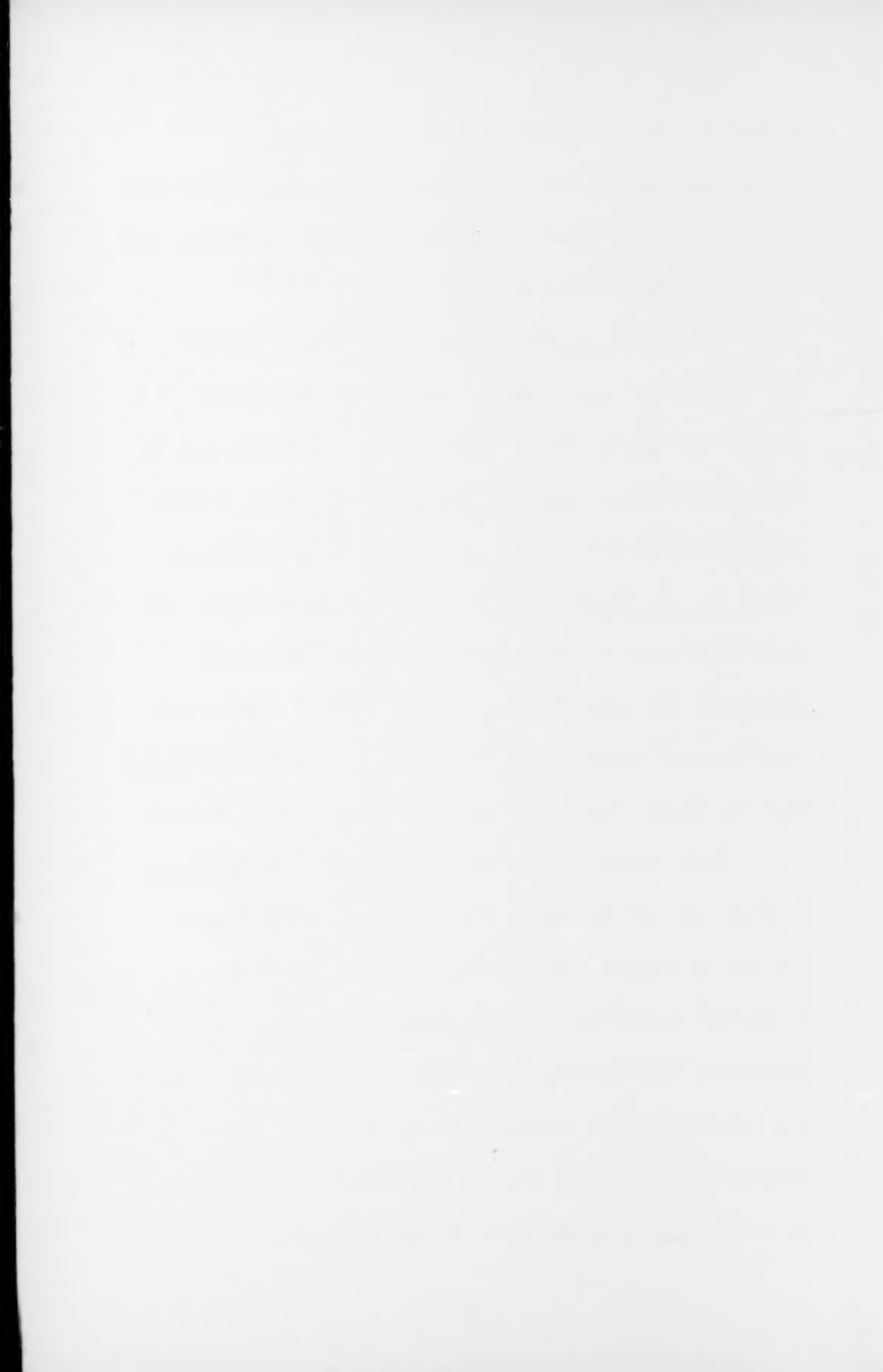
Respondent's insistence that the Courts are not allowed to "reweigh" the facts and that due process has been accomplished by the invalidation hearing before a BLM Hearing Examiner is patently



absurd, particularly because, unlike criminal prosecution, the Respondent is not barred from appealing decisions in favor of the mining claimant.

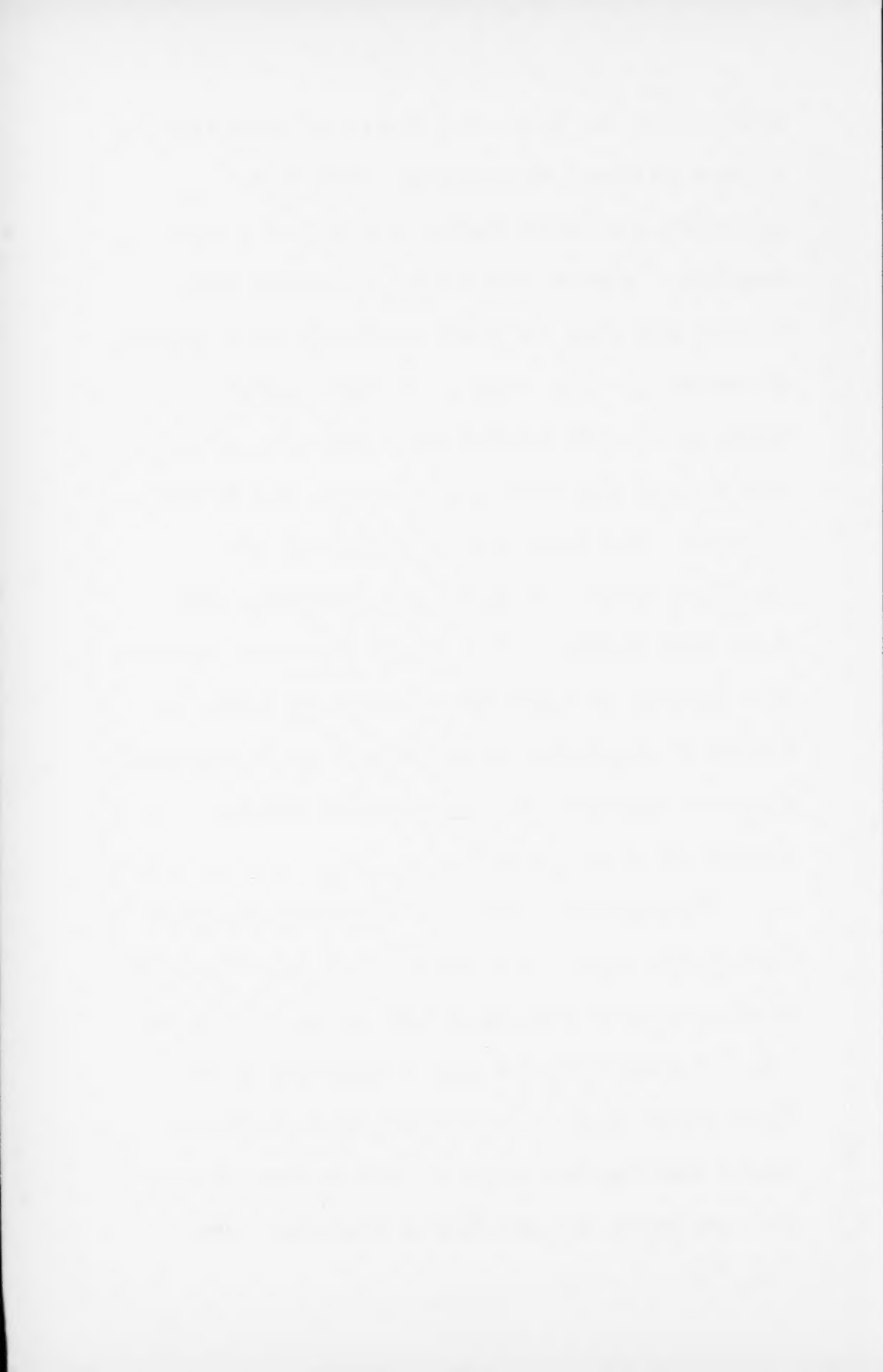
In U.S. v. Haskins, (59 IBLA 1(1981), on December 30, 1984, in CV-82-M, fifty years of government attempts to invalidate Haskins' rock quarry came to an end. The District Court affirmed the IBLA decision in U.S. v. Haskins, supra, to overturn the administrative law judge who ruled for Haskins on the facts in CA 2755. Haskins could not afford to appeal. The Government had broken the back of another small miner.

The last round of the Haskins defense began in 1972, when the Forest Service filed a complaint in ejectment in the federal district court charging that Haskins was producing placer mineral from an invalidated lode mining claim. The court refused to force Haskins to vacate his mining claims and ordered the



Department to hear the facts of Haskins' placer mineral discovery. The U.S. Attorney motioned immediately for a rehearing. Again the court directed the Forest Service to hear evidence of a placer discovery, this time in a memorandum opinion No. CV 72-246-JWC (May 18, 1972). The Forest Service appealed to the Ninth Circuit, but that court affirmed the District Court in U.S. vs. Haskins, 505 F.2d 246 (1974). The Ninth Circuit ordered the Bureau of Land Management to hear Haskins' evidence with regard to a valuable mineral deposit on the Haskins Quarry Placer Mining Claim.

Thereafter, the BLM's Administrative Law Judge (ALJ), CA 2755 found the Haskins Quarry placer mining claim to be valid and the IBLA called the ALJ's opinion only "advisory" and in a review de novo found their own facts, none of which were based on testimony at the ALJ's hearing. On



appeal the Federal District Court refused to tamper with agency discretion.

In the case now before the Court, Sullivan's appealed the decision of the Hearing Examiner to the IBLA. In that appeal, Sullivan focused on the idea that he had not been represented by legal counsel at the hearing. At the hearing, he had preferred to have an engineer represent and defend the mining claims, presumably believing that the expertise necessary for such a presentation was not legal in nature. Only after the BLM Hearing Examiner submitted his decision, did Sullivan understand that legal opinions of the government's mineral examiner (Appendix 34, 41-42, 46-48) were the crux of what the Interior Department and the courts below have called "substantial evidence." (See Pet. App. 28.)

Sullivan had not hired in his defense anyone to declare that his deposit was not



a "common variety" nor to declare that he was a "prudent man". The BLM mineral examiner's legal opinion on these two matters has defeated all Sullivan's evidence of a bona fides in development on the claims.

CONCLUSION

Nothing in Respondent's Brief in Opposition is of substance necessary to deter the Court from granting Petitioner a writ of certiorari.

Hale C Tognoni

Respectfully submitted,
Hale C. Tognoni
Counsel for Petitioner



IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1984

Robert L. Mendenhall,

Petitioner

vs.

No. 84-718

United States of America,
et al.

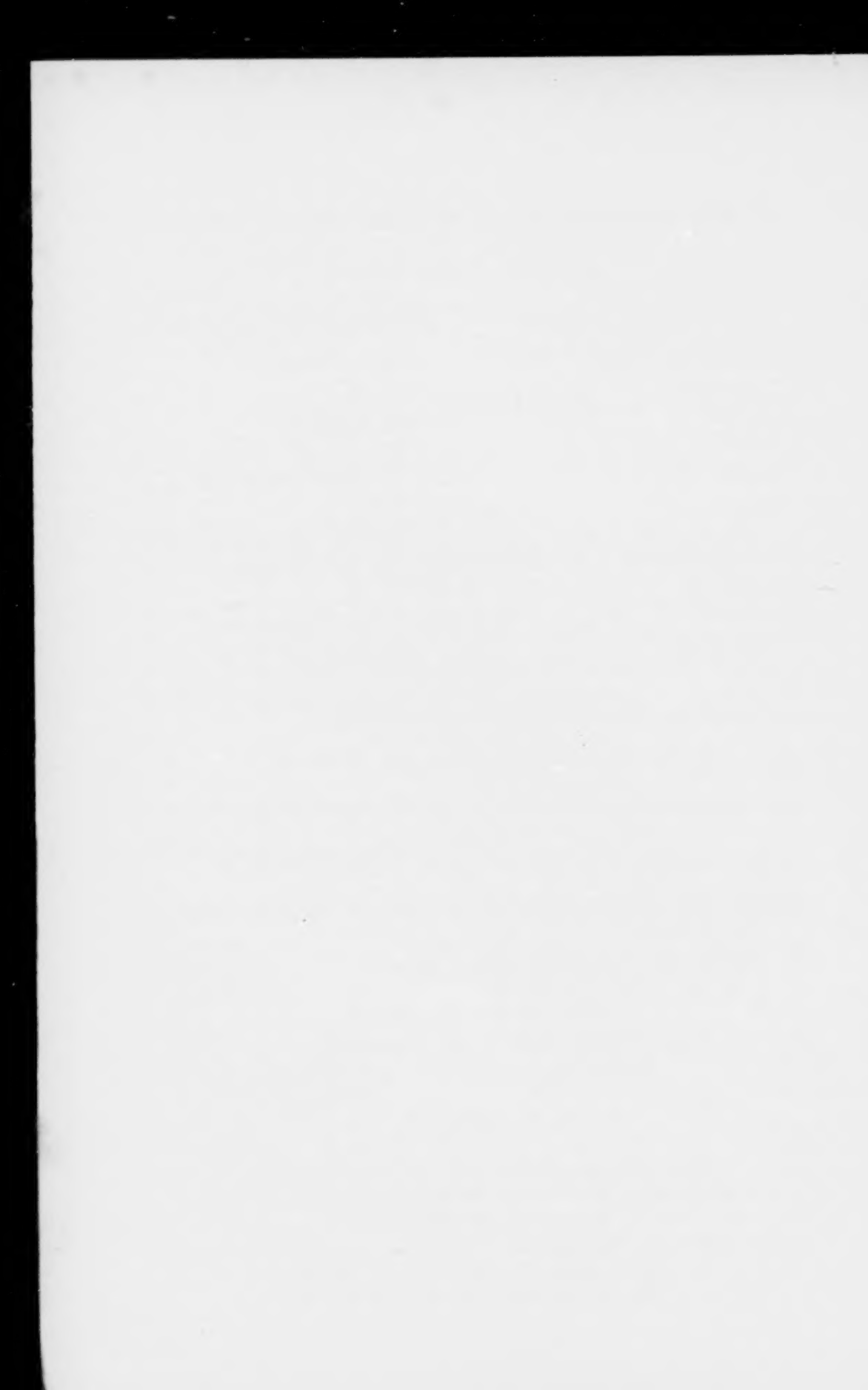
CERTIFICATE OF SERVICE

It is hereby certified that all parties required to be served, below, have been served copies of the PETITIONER'S REPLY TO RESPONDENT'S BRIEF IN OPPOSITION by mail on January 23, 1985:

Solicitor General
Department of Justice
Washington, D.C. 20530

and

The Department of the Interior
Land and Natural Resources Division
Appellate Section
Attn: Wendy B. Jacobs, Attorney
18th and C. Streets, N.W.
Washington, D.C. 20240



Hale C. Tognoni

Hale C. Tognoni
Attorney for Petitioner
100 W. Clarendon, Suite 1260
Phoenix, Arizona 85013

STATE OF ARIZONA)
) ss.
County of Maricopa)

Subscribed and sworn to before me
this 23rd day of January, 1985.

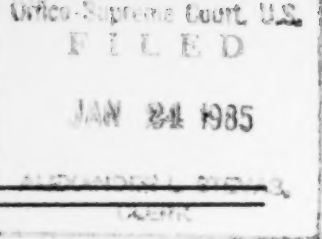
Brian J. [Signature]

Notary Public

My Commission Expires:

FEB 28 1986

6
Number 84-718



IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1984

ROBERT L. MENDENHALL, Petitioner,

vs.

THE UNITED STATES OF AMERICA, ET AL.

**PETITION FOR WRIT OF CERTIORARI
FROM THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

**APPENDIX TO
PETITIONER'S REPLY TO RESPONDENT'S
BRIEF IN OPPOSITION**

**Hale C. Tognoni
Counsel for Petitioner
(602) 263-0771**

**Law Office of Hale C. Tognoni
100 W. Clarendon, Suite 1260
Phoenix, Arizona 85013
(602) 274-6694**

109 pp

UNITED STATES DEPARTMENT OF THE INTERIOR
BUREAU OF LAND MANAGEMENT

UNITED STATES OF AMERICA,)	
)	
Contestant,)	Claim Nos.
)	N-065732
vs.)	N.-065733
)	
FRANK R. SULLIVAN,)	
)	
Contestee.)	
)	

REPORTER'S TRANSCRIPT OF HEARING
OF

FEBRUARY 18, 1971 taken at
United States Federal Building
300 Las Vegas Boulevard, South
Las Vegas, Nevada, 9:30 o'clock A.M.
Room 4-612

Reported by:

MANPOWER, Inc. of Southern Nevada
515 Las Vegas Boulevard South
Las Vegas, Nevada 89101
(702) 384-1082

HEARING EXAMINER:

**DEAN F. RATZMAN
OFFICE OF THE HEARING EXAMINER
ROOM W. 2426
2300 Cottage Way
Sacramento, California 95825**

**FOR THE BUREAU OF
LAND MANAGEMENT:**

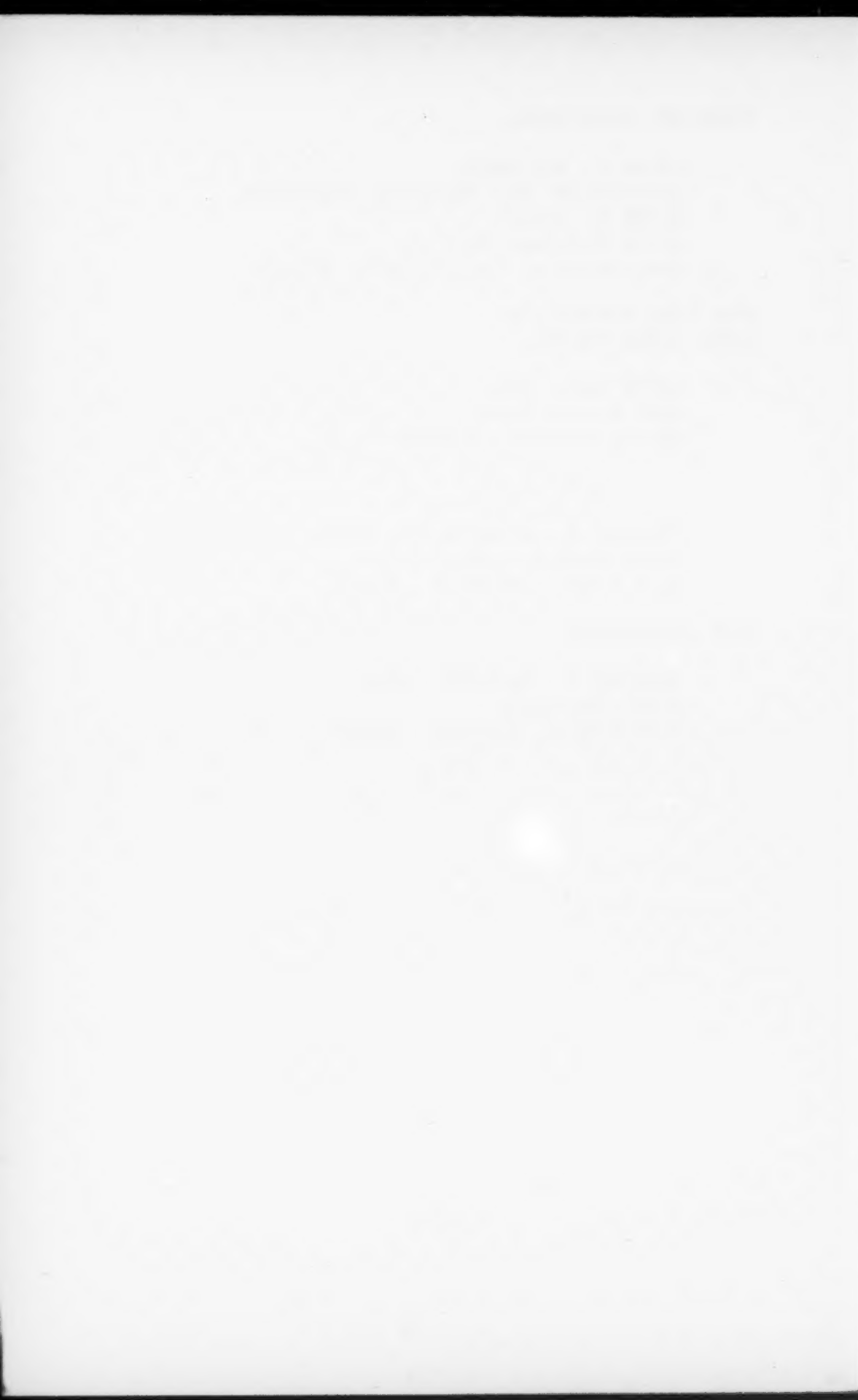
**OTTO AHO, ESQ.
300 Booth Street
Reno, Nevada 89502**

and

**THOMAS E. SCHESSLER, ESQ.
1859 Decatur Boulevard
Las Vegas, Nevada 89108**

FOR CONTESTEE:

**ROBERT J. McNUTT, ESQ.
P.O. Box 539
Las Vegas, Nevada 89101**



No.	Exhibits	Page
G-1	Radial map of Las Vegas area showing contested claim relative to City of Las Vegas	2
G-2	Index map of unpatented placer mining claims in the Lone Mountain Canyon area, prepared by Don Fisher	2
G-3	Aerial photo taken April 15, 1985	2
G-4	Location Notice, Charleston No. 24 claim	4
G-4A	Location Certificate, Charleston No. 39 Claim	4
G-5	Location Notice, Charleston Spur Claim	5
G-5A	Location Certificate, Charleston Spur No. 1 claim	5

INDEX OF WITNESSES

Witness	Direct	Cross	Redirect	Recross
THOMAS E. SCHESSLER	68	47	7	6
FRANK R. SULLIVAN		36	19	

(Page numbers have no meaning to this duplication of original transcript)



BY THE HEARING EXAMINER: The United States of American versus Frank R. Sullivan, Contest Nos. N-065732 and 065733. This is the time and place scheduled for the hearing, and notice dated January 11, 1971. Mr. Frank R. Sullivan, the contestee, is present in the hearing room accompanied by his consultant, Mr. Robert J. McNutt. Would the government counsel please enter his appearance.

BY MR. AHO: Yes. Otto Aho, field soliciter, U.S. Department of the Interior, Reno, Nevada. . .

BY THE HEARING EXAMINER: Did the government counsel or Mr. Sullivan or his consultant wish to take up any matter respecting exhibits or stipulations prior to the completion of all --.

BY MR. AHO: Oh, we might take five minutes just to explain the exhibits.



BY THE HEARING EXAMINER: Do you want this to be on the record?

BY MR. AHO: No. Let this be off the record for five minutes.

(Off the record discussion held.)

BY THE HEARING EXAMINER: We will be on the record. Mr. Sullivan, Mr. McNutt, the government has posted three proposed exhibits, 1, 2, and 3. There has been some discussion off the record relating to these exhibits. Do you have any objection to the introduction of those three exhibits for purposes of explaining this case:

BY MR. SULLIVAN: This map here, that you've got here, doesn't show about \$15,000 worth of work.

BY MR. AHO: Then you could add it on when you testify and mark down there what you say you have done. Yes, you could do that.

BY MR. SULLIVAN: It doesn't show what I done in order to market this gravel.



BY MR. AHO: You could comment on that when you testify.

BY THE HEARING EXAMINER: Well, subject to that understanding, Mr. Sullivan, do you have any objection to the exhibits? You can testify and show additional work.

BY MR. SULLIVAN: No objection at all.

BY THE HEARING EXAMINER: Exhibit nos. G-1, G-2 and G-3 as marked, are admitted without objection and subject to the understanding that Mr. Sullivan and his consultant will have the right to testify and mark on the exhibits and show other features or other work that they testify was done.

BY MR. AHO: I am ready to proceed. I call Mr. Schessler.

BY THE HEARING EXAMINER: You may proceed.

THOMAS E. SCHESSLER, having been first duly sworn to testify to the truth, the



whole truth and nothing but the truth,
testifies as follows:

DIRECT EXAMINATION

BY MR. AHO:

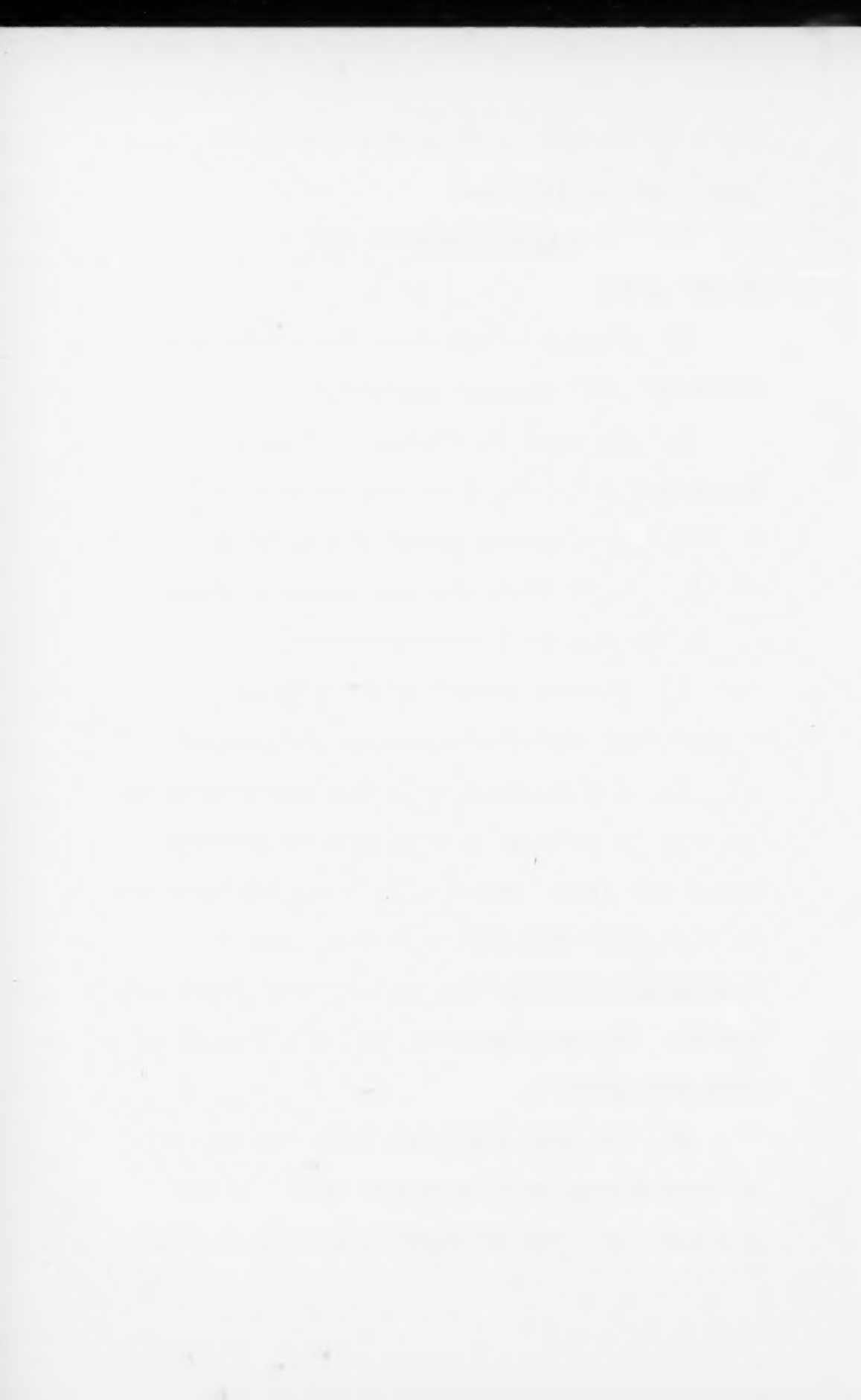
Q Please state your full name and
title of your present position.

A My name is Thomas E. Schessler,
S-C-H-E-S-S-L-E-R; I am employed as a
mining engineer and lands and minerals
staff officer with the Las Vegas District
of the Bureau of Land Management.

Q Please relate briefly your
educational and professional background.

A I graduated from the University of
Montana in 1952 with a degree in geology
and since that time I have been employed in
both private and public work: U.S.
Geological Survey, various mining companies
and U.S. Forest Service, and the Bureau of
Land Management.

Q In your position with the Bureau
of Land Management have you been, or are
you now required, to examine mining claims?



A I am.

Q In connection with your official duties with the Bureau of Land Management, have you examined sand and gravel mining claims or deposits in the Las Vegas area?

A I have.

Q How many, and over what period of time?

A I haven't actually counted them. I would be somewhere from twenty to thirty claims in the Las Vegas Valley for sand and gravel.

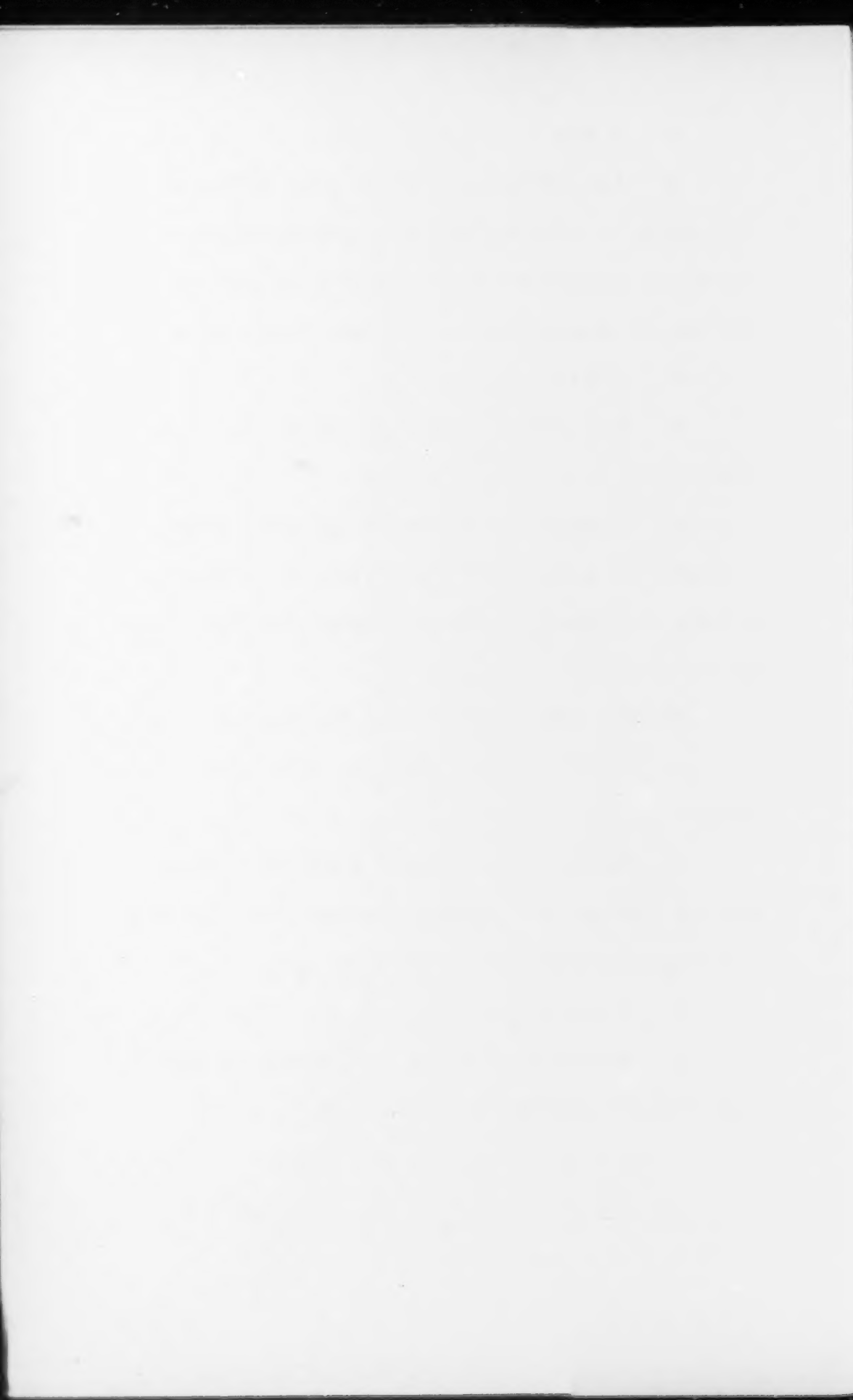
BY MR. AHO: Over what period of time?

A A little bit better than four years.

Q Have you examined sand and gravel mining claims or deposits other than in the Las Vegas area?

A I have.

Q Where else have you examined sand and gravel claims or deposits?



A In the states of Montana, Idaho, Washington, and in the eastern states of Pennsylvania, Vermont, Kentucky, Virginia, West Virginia and in Ohio.

Q Approximately how many of these other claims did you examine?

A I haven't counted, but I would estimate around a hundred.

Q Did you receive or make any preparation to study generally before you began your examination of mining claims in the Las Vegas area?

A I did.

Q What preparations or studies did you make?

A When coming into a new area, you always learn as much about the geology as possible, which means reading the publications available. There is a good one on Clark County by the U.S. Geological Survey in the State of Nevada, and I also researched the District Office files for



work that had been done in years past by other mining engineers employed by the Bureau.

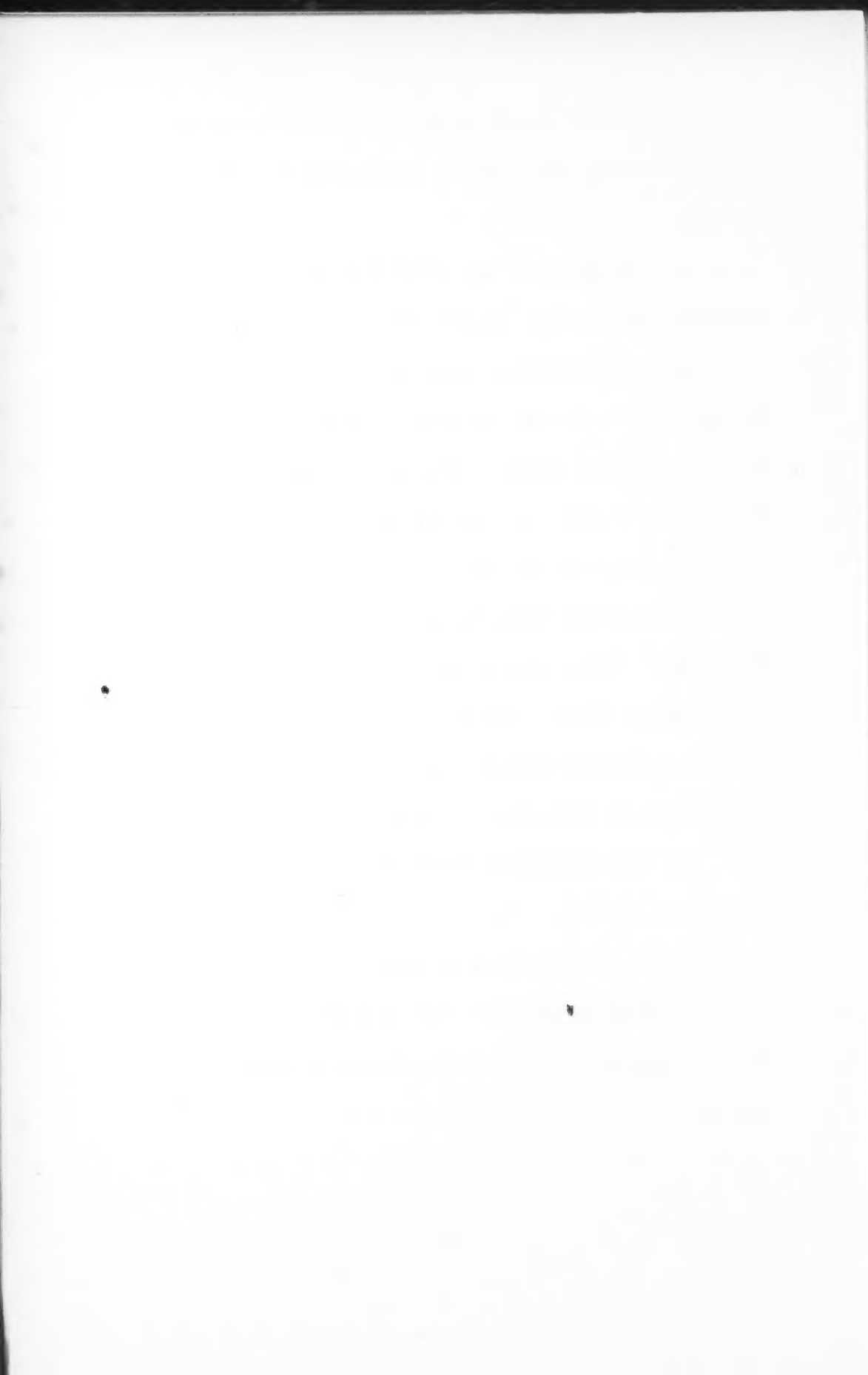
Q When and by whom were the contested claims located?

A They were located by Mr. E. H. Browner. I think he was the sole locator of Charleston Spur, now known as Charleston Spur No. 1 and he had seven co-locators on the Charleston 24/39 claim. I have here some certified copies of the Location Notices. They were located in -- Charleston Spur, on February 28, 1955 and the Charleston placer no. 24 was located on the 29th of February, 1955.

BY THE HEARING EXAMINER: Off the record.

(Off the record discussion held.)

BY THE WITNESS: This Location Certificate is for Charleston placer no. 24.



BY MR. AHO: We offer that as exhibit G-4.

BY THE WITNESS: That is the Location Notice which was recorded. Now here is a Certificate of Location for the same lands, but described as Charleston placer no. 39. And this is the reason for calling that --

BY MR. AHO: Well, we'll go into that a little later. We'll offer that as exhibit no. --.

BY THE HEARING EXAMINER: We'll make that G-4-A.

BY MR. AHO: All right.

BY THE WITNESS: This next one is the Location Notice for the Charleston Spur.

BY THE HEARING EXAMINER: We post exhibit G-5.

BY THE WITNESS: And next, and last, is Location Certificate for Charleston Spur no. 1, which describes the same land as the Charleston Spur Location Notice.



BY THE HEARING EXAMINER: We post exhibit G-5A.

BY MR. AHO: We offer exhibits G-4, G-4-A, G-5 and G-5-A.

BY THE HEARING EXAMINER: Exhibits G-4, G-4-A, G-5 and G-5-A are received without objections.

Q (By Mr. Aho) Do you know when the contestee, Mr. Sullivan, acquired the contested claims?

A I do not. I did not do any research on that myself.

Q The Complaint in this proceeding refers to the Charleston no. 24 is also Charleston no. 39 and extension 39 of the Charleston placer mining claims. Do you know why the three different names are used by the one claim?

A Yes. The original Location Notice for the Charleston no. 24 which would be exhibit no. G-4, is for Charleston no. 24, and it describes the lands to be -- the

Location Certificate which was filed later describes the same lands, but calls it Charleston placer no. 39.

Q Referring to what exhibit?

A This is on exhibit G-4-A. Now, substantially the same thing is true of the Charleston Spur claim. The Location Notice, exhibit no. G-5, was filed and followed by the SLocation (sic) Certificate, called Charleston Spur no. 1, and the same lands are described.

BY THE HEARING EXAMINER: When did the phraseology for extension 39 of the Charleston come from?

BY THE WITNESS: Extension 39 was then used later to describe the same lands in Proofs of Labor, so that the names apply to the identical land.

BY MR. AHO: Will that satisfy the Examiner; the reason for three different names used in the Complaint?



BY THE HEARING EXAMINER: Yes. That's all right now.

Q (By Mr. Aho) What is the legal description of each of the contested claims?

A They are rather long. I shall have to read them from my notes.

BY THE HEARING EXAMINER: I don't know if that will have to be done. The Complaint contains the description. I wonder if the witness would review that to indicate whether or not it is correct.

BY MR. AHO: The descriptions are shown on the Location Notices anyway, are they not?

BY THE WITNESS: They are shown on the Location Notices. They are not complete in the Complaint, however, they are in the appropriate Sections and Townships and Ranges.

BY MR. AHO: All right. Before we get into your testimony, I think you should go



to exhibits G-1, G-2 and G-3 and state briefly what each exhibit purports to show and represent.

BY THE WITNESS: Exhibit G-1 is a map of the Las Vegas area. It was made to show various distances. The circles represent distances from the center of town; the center of town here taken as the corner of Fremont and Main Streets. Each circle has a radius of 2-1/2 inches, so that as you go to each circle, you extend the radius of 2-1/2 more inches. And that is used as an exhibit to show the relationship, geographically and in distance from the center of town to the claims that we are talking about today, as compared to other sand and gravel operations in the Las Vegas area.

BY MR. AHO: Now, you stated that each circle represents a distance of 2-1/2 inches.

BY THE WITNESS: 2-1/2 miles.



Q (By Mr. Aho) And the claims are indicated in red in the northwest corner, is that correct?

A Charleston 24/39 is indicated in red. The Charleston Spur claim is indicated in blue. Exhibit G-2 is a map that was prepared in the Las Vegas District Office. It is a larger scale than exhibit G-1 and the claim locations have been plotted on this map, relative to some of the hard rock geology of the area, literally speaking. A road and the Charleston 24/39 claim is shown in yellow. The Charleston Spur is shown in green.

Q You also indicate certain improvement on there, do you not?

A I do. I do not indicate all improvements on this map.

BY MR. AHO: We will go into that detail later.



A Exhibit G-3 is an aerial photograph. The pictures for this were flown for the Bureau of Land Management in April, 1965. The precise date -- on April 15, 1965. The map is a compilation made by the same people who took the original pictures, American Aerial Surveys in Covina, California. I ordered the mosaic made in October, 1969, received it on October 27, 1967. I asked that the American Aerial Surveys people use the survey information available to them to plot the Sections on the aerial photographs, and this is why the Section lines are shown as a part of the mosaic which makes up the photo. You will notice we have complete survey information for Sections 35 and 36 Township 21 S. -- 19 S., I beg your pardon -- Range 59 E., and we have the same information for 20 S., 59 E. But here in Section 34 of 19 S., 59 E. the survey information is less



complete. There is information, the distance between the corners of Sections 33 and 34 and Sections 34 and 35 on this east-west line on the south boundary of the Section. Information is less complete to the north; however, on the survey plat this line on the west side of Section 34, its entire distance is given on the survey, although it is not plotted for its entire distance on this aerial photograph.

Q Now, what do the red bordered area indicate?

A The red bordered area indicate the outlines of the claims with which we are dealing today. The bordering Sections 35 and 36 is Charleston no. 24/39 claim. The outline in Section 3 of 20 S., 59 E., and in 34, 19 S., 59 E. are the two separated portions of the Charleston spur as they are described in the Location Notice.

Q You have added on there also the description of the claims underneath the respective claims, you have not?



A I have.

Q In connection with your official duties, were you assigned to make an examination of the placer mine claims which are the subject of this proceeding?

A I was.

Q Why were you assigned to make an examination of the claims?

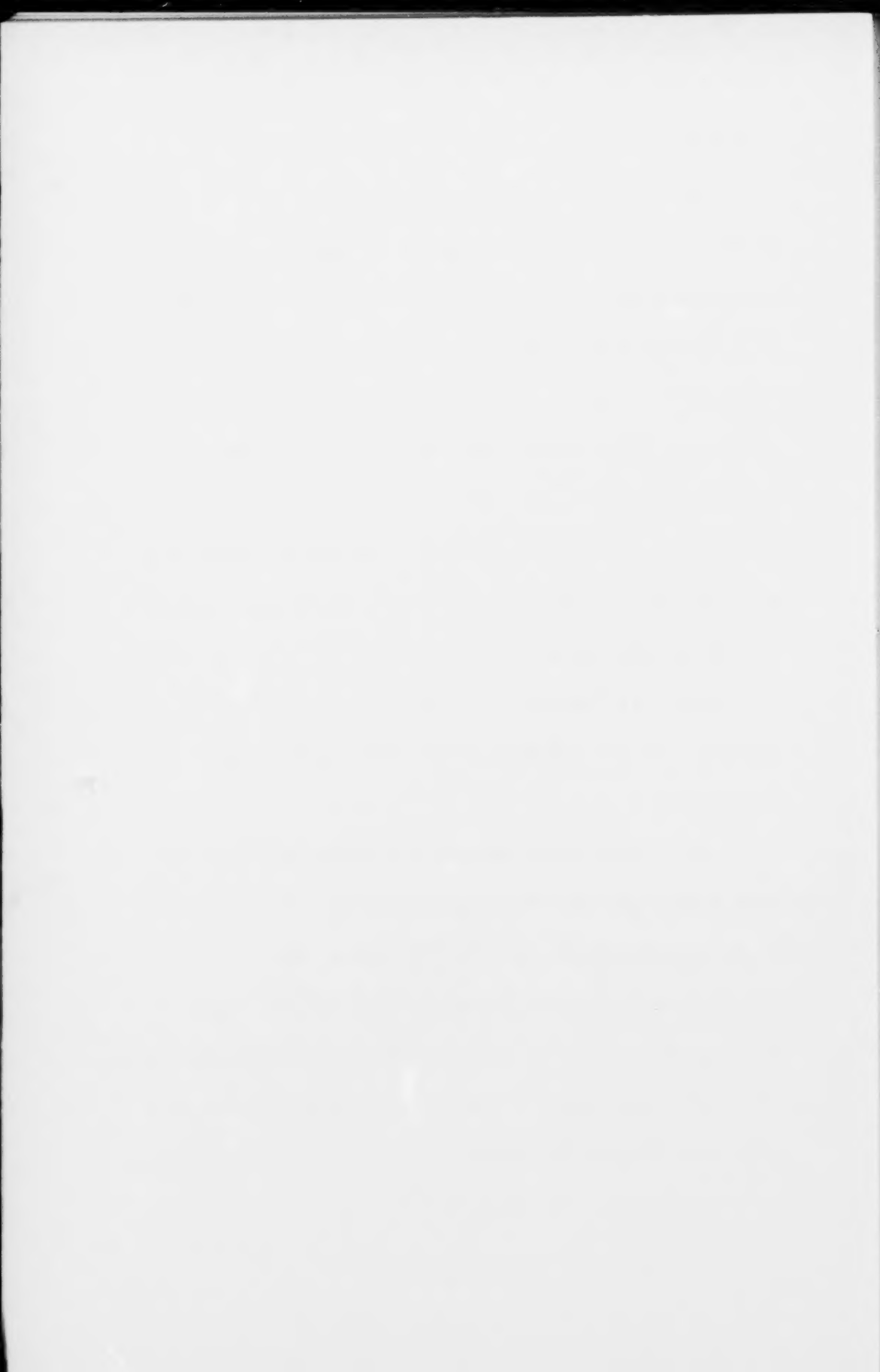
A The hearing was coming up and the mining engineer who did the original work -- original examination work on which the contest was based -- the complaint is based, is no longer with the Las Vegas District.

Q And upon whose recommendation was the pending contest proceeding initiated?

A It was initiated upon the recommendation of Donald G. Fisher, the mining engineer I referred to.

Q At that time he was employed in the Las Vegas Office?

A Yes, he was.



Q And where is Mr. Fisher now?

A Mr. Fisher now works under the direction of the Phoenix District, Phoenix, Arizona, Bureau of Land Management. I believe he is based in Kingman, Arizona.

Q Did you make an examination of the contested claims?

A I did.

Q When?

A I examined them twice: on January 22, 1971, and again on February 11.

BY MR. AHO: Also 1971.

A 1971. Yes, sir.

Q Did anyone accompany you or any of your examinations of the claims?

A Frederick B. Mullin, a geologist employed by the Las Vegas District, Bureau of Land Management, accompanied me on the January date. I was alone on the February date.

Q How did you identify the exact area upon which each claim is located?



A I started with the U.S. Geological Survey topographic maps, and the descriptions of the mining claims as given in the records. I went out to the ground and I found various corners on the survey, actual survey markers. I identified myself on that map, on the aerial photograph and transferred that information -- rather, checked that information against the map already prepared by Mr. Fisher.

Q From a geological standpoint, where the claims are located to which you refer to exhibits, refer by exhibit numbers.

A Referring to exhibit G-1, the claims are northwest of the City of Las Vegas. They are approximately eleven airline miles northwest, and about twelve miles by road. By going out Tonopah Highway, about seven miles to what we call the Lone Mountain Road. You turn off on that road to the west and it's another five or six miles to the area of the claims.



Q What is the topography and elevation of the area where the claims are located?

A The topography consists of a draw, or a number of draws; one major draw and some gravelly bands extending eastward from the foot of the mountains. The Charleston Spur claim is in the more mountainous part of the area and in terms of elevation, I checked the maps, checked the elevation and must look for it in my notes. The elevation varies from, on the east above sea level on the east end to about 3,350 or 60 feet above sea level here on the west end of Charleston Spur. I beg your pardon, Charleston 24/39. Charleston Spur the elevation varies considerably, but goes as high as about 4,000 feet.

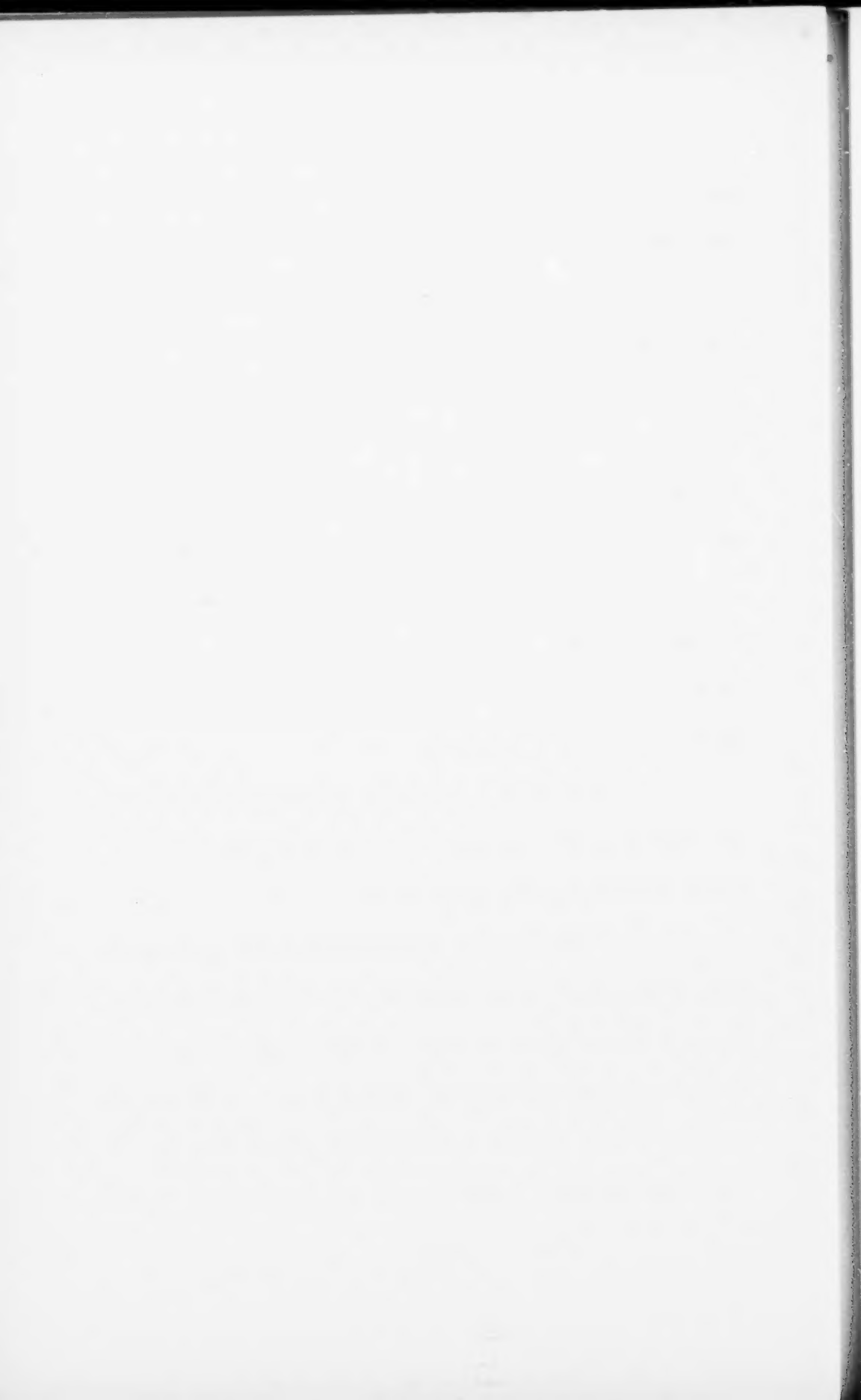
Q What is the geology and mineralization of the area where the claims in question are located?



A Referring to exhibit G-2, the wavy pattern, the shaded pattern on the map indicates big outcrops of the Goodsprings dolomite. The Goodsprings dolomite is cambrian-ordovician in age, paleozoic, and it varies in color from light tan to dark grey. It contains chert nodules and lenses or bands and laminated kenclusion (sic), which is an iron oxide. The remainder of the area consists mostly of the alluvial outwash from the eroded hardrock formations. Drainage is to the east in this area.

Q How did you make your examination of the claims in question and of what did your examination consist?

A I made the examination by going on the ground with a four wheel drive vehicle both times, and of course we looked for whatever improvements there were, and -- we and I. The first time there were two of us. We walked some areas of the claims and



the examination was visual. We looked at the property and compared it with other areas.

Q At the time of your examination, what was the appearance of the ground on which the claims are located with respect to physical evidence of development and workings?

A I will refer to exhibit G-3, primarily, and to exhibit G-2. On exhibit G-3, I have placed nothing that was found on the ground. In other words, I did no writing. All I did was outline the boundaries of the claim so that this shows the properties as of April 15, 1965. There were no changes made on the photograph. There were two major -- one could call them major -- cuts on Charleston 24/39.

Q As of 1971?

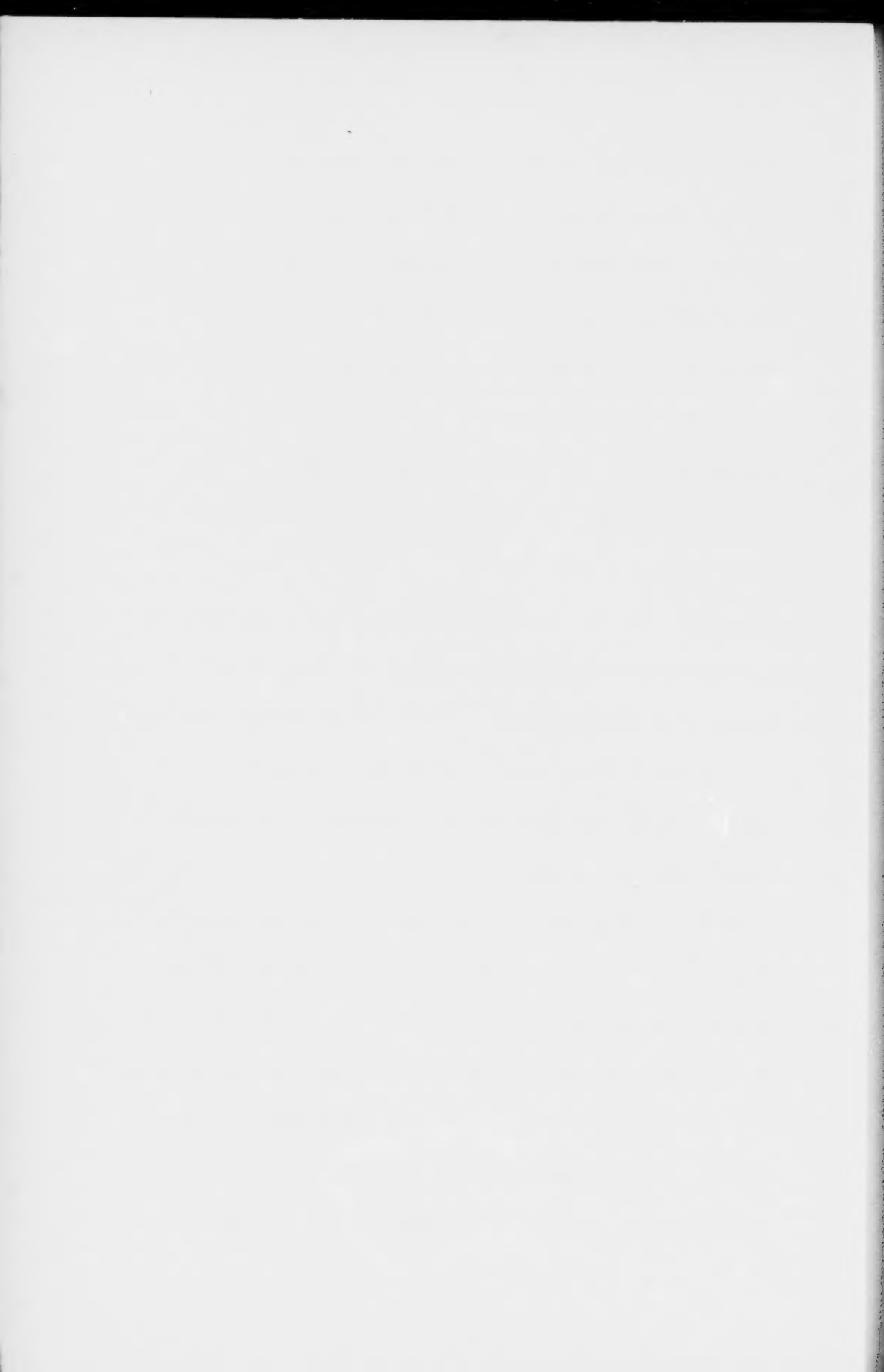
A As of February 11 and January 22, 1971. These consisted of bulldozer cuts, both near the east end of the claim; one



right near the east end line. The cut on the east end line -- I paced it only -- was about 245 by 130 feet, and the gravel was piled up on the south edge of a kind of radial excavated area and draw. There was nothing removed, as far as I could determine. The other cut was a bulldozer cut about an eighth of a mile farther west -- a quarter of a mile farther west, excuse me, and still within the Charleston 24/39 claim. Unfortunately, I did not write it down, the dimensions of this cut. It's fairly large. As I recall, it's about 15 feet wide at one end and probably 75 feet long, and as much as 15 feet deep. Again, the material that came out of it seemed to still be there. It was piled up on the east end of the cut. In addition, there were some bulldozer cuts of older vintage, two or three of them in this portion of the Charleston 24/39 called 13A which was a piece of property held by -- also by



someone else, and a cut or two on 11. These were older. I did not measure them. The material seemed all to have been in place, near the bulldozer cut. There were also a number of piled stockpile rock in the very northwest corner of the portion shown as 11 of Charleston 24/39. I estimate them to be a total quantity of nearly 2 or 300 yards. I don't know whether these bulldozer cuts in 13A and 11 portions of Charleston 24/39 -- I don't know who made them. They have been there for some time, and I did put them on this map. Now, in addition, there is a road that has been built up the Section line, or rather, it's easier to describe up the Township line, between 19 and 20 S. from some distance to the east, up adjacent to 24/39 along this Township line and one spur of an older road, the old Lone Mountain Road, that comes south into the east end of Charleston 24/39. In addition to that,



there is an old trail that traverses almost the entire length of Charleston 24/39 claim. I saw no improvements on Charleston Spur no. 1.

Q And did you examine the workings and other openings on the contested claims?

A Yes.

Q In your examination of these workings and other openings, of what did your examination consist?

A Again, the examination was visual. The material was sand and gravel.

Q What is the nature and composition of the material found on the contested claims? Is it similar on both claims?

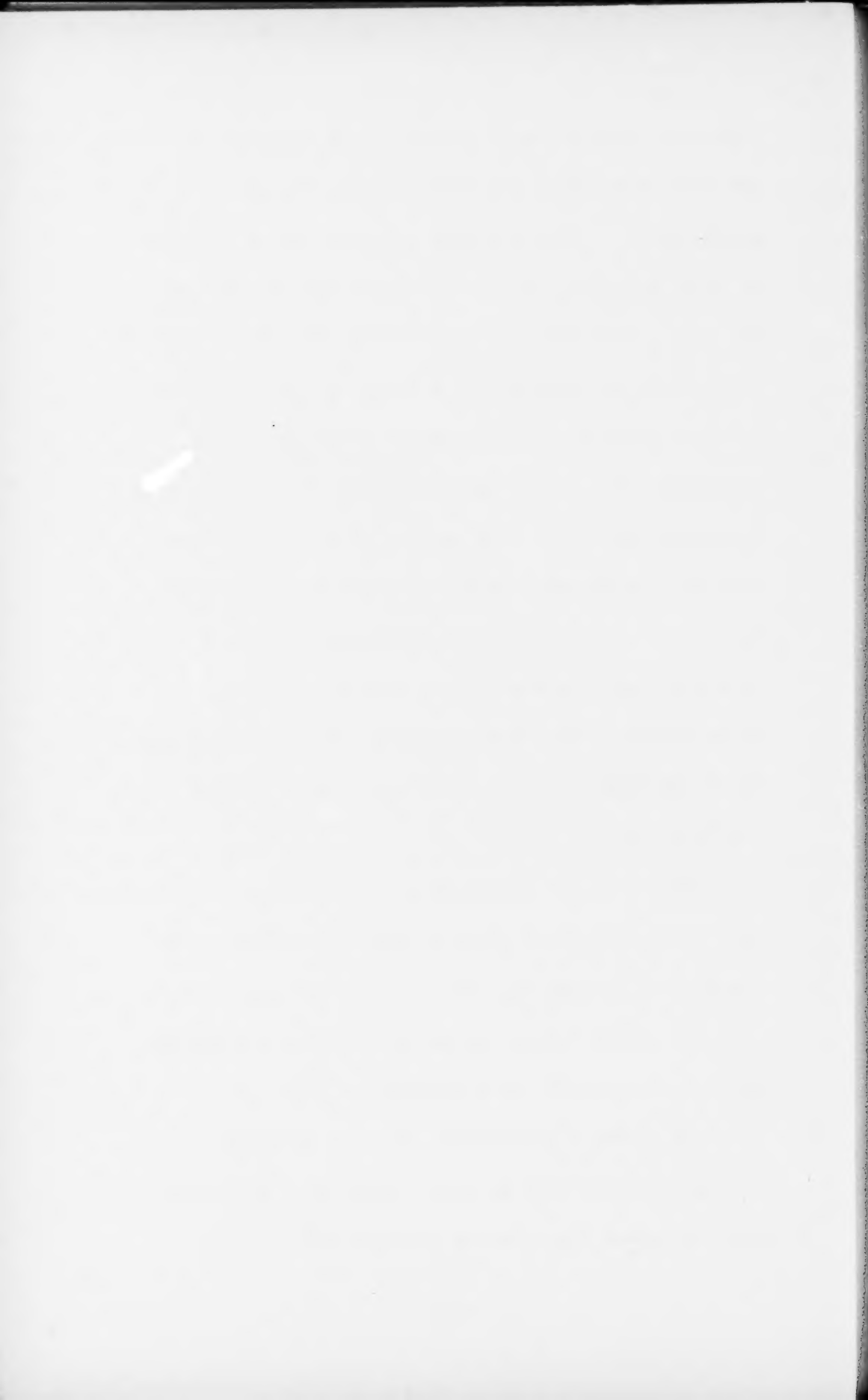
A No, it is not. There are similarities on Charleston 24/39 and the material is pretty much the same. There are two types, one might say, of sand and gravel in this claim. One you might refer to as bank gravel which would be the fan portions of the sand and gravel. The other

one you could call the stream gravel which, on the west end of the claim, is most prominent. The stream gravel is a little better washed, a little cleaner than what we call the bank gravel. On the Charleston Spur no. 1, there is a very little bit of stream gravel in the draw that goes up through the lower portion of the claim and extends up into the upper portion of the claim. However, most of the Charleston Spur no. 1 is bedrock outcrop of the Goodsprings formation previously described. The bedrock is not exposed as such on Charleston Spur -- these names -- on Charleston 24/39.

Q In your opinion, for what purposes may the sand and gravel material be used that are found on the contested claims?

A For just about any uses to which sand and gravel are normally put.

Q What portions of the claims contain sand and gravel that you believe may be used for these purposes?



A The Charleston no. 24/39, I would say, substantially all of it. At least as far as surface indications and depth of the bulldozer cuts. The Charleston Spur no. 1, there is a small area of sand and gravel, probably not more than three acres of stream type, or at least alluvial, a little bit better washed sand and gravel than you would find in the fans. On the upper portion of the Charleston Spur no. 1, the sand and gravel, as such, would be negligible. These are bedrock exposures.

Q What processing, if any, would be required to make the material on the claims in question suitable for these uses?

A It would depend on the use, but some of it, if it were used for fill material, base material, some of it probably wouldn't even require screening. These seems to be enough fines that it would tap very well, but it could be processed to almost any use required for



sand and gravel by washing or screening, and crushing, perhaps, depending on specifications.

Q Are the claims involved in this proceeding located on land consisting almost exclusively of sand and gravel?

A Again, Charleston 24/39 is. Charleston Spur is not.

Q That's where this small area is.

A Except for the approximately three acres to which I referred.

Q What are the general and normal uses for the general run of sand and gravel deposits in the Las Vegas area?

A The predominant use, as in most cases, is for fill material, base materials for roads. Other uses are in concrete, ready mix concrete. Sand can be used in plaster, but since I ran no tests, I cannot say for certain, but I doubt that sand as such is a very important constituent up there. I would not swear to it.

Q How does the sand and gravel material found on the contested claims compare with the other sand and gravel claims and deposits you examined in the Las Vegas area?

A They are similar, except that there are two basic types of deposits in the Las Vegas Valley. On the east and west sides of the Valley, sand and gravel deposits consist mostly of the limestone-dolomite fragments eroded from Frenchman Mountain and portions of the Spring Mountains to the west. On the south end of the Valley, Black Mountain or McCullough Mountains, are tapped by volcanic rocks so that the sand and gravel deposits on the south end of the Valley will also be volcanic in origin. The carbonate rocks, the dolomite and limestone usually have a somewhat higher specific gravity than do the volcanic rocks. The volcanic rocks are frequently somewhat harder, but probably more brittle than the carbonate rocks.



Q These claims are located on the west side of the Valley?

A They are, on the northwest side of the Valley.

Q Are there any differences with the material found on these claims and the other sand and gravel deposits or claims on the west side of the Valley?

A No real material differences, no. You may have variations in size gradations and so on. That will vary from place to place, depending on the distance from the mountain and the origin of the materials. That would be the base difference. However, in some areas there is a touch caliche, almost a concrete-like material in appearance that underlies the sand and gravel deposits or, in fact, outcrops to the surface. Now, this caliche was not observed here. There are little thin cemented areas, but they are easily broken. Caliche would not be a problem so far as is known.



Q Were you able to make any determination if there had been any actual production and sale of materials from either one of the contested claims?

A To the extent of the information that I observed, or that facts that I observed, the situation on the ground, this is the extent of that. And it indicates that none was marketed or removed.

BY MR. SULLIVAN: On none of the claims?

BY MR. AHO: You can testify to that later.

Q (By Mr. Aho) In your employment with the Bureau of Land Management as an examiner, in your examination of a mining claim, were you required to make recommendations to your supervisors as to whether or not a contest should be initiated against the claims?

A I am.

Q In making your recommendations on sand and gravel mining claims, what criteria or factors do you use or consider in making your recommendations?

A The first criteria to which probably the other are tied, is what we call the prudent man clause. It is the recognized criteria in mining law. There must be such a discovery of valuable mineral within the limits of each claim as would warrant a prudent man, in the expenditure of his labor and his means, with a reasonable prospect of success in developing a profitable or paying mine. The prudent man, he has to have, or should have at least a -- material must be -- he must be able to extract it, remove it and market it at a profit. In order to extract it, remove it and market it, he must have a sufficient material, must have a proximity to market and one of the things -- bona fides in development are important here



because they tend to show how much was done to develop the property and to show what is in the property. And there must be a market, a present market, and a market as of the time of discoveries for the claim.

Q What about the status of the land?

A Of course, the land must be open to location at the time the claims are located. The research I have done indicated that the land was open to location, so the claims are -- were properly located on lands open for location.

Q At the present time, are there any conflicting uses for the land involved in this proceeding?

A Not on the lands that are covered by these claims.

Q You did mention the criteria of bona fides in development and what is your opinion regarding the bona fides in development regarding -- well, first I

better ask, what do you mean by bona fides in development?

A Bona fides in development are the work that was done to show the quantity and quality of material on the property, getting it ready for production and marketing. This may require drilling, bulldozer cuts, providing access, any number of things. Physical work on the ground.

Q As of January, February, 1971, what is your opinion regarding the bona fides in development with respect to the two contested claims?

A I will refer to the exhibits G-2 and G-3. As of these dates, there was some work shown on the ground, including a road, which I understand by conversations with Mr. Sullivan, was built by or at his request. The road follows the Township line between Townships 19 and 20 S., and it is a good gravel road, from near the



Tonapah Highway where it branches from the old Lone Mountain Road to the vicinity of the claims; the Charleston 24/39 claim. The Charleston Spur claim is passed very closely by the old Lone Mountain Road which goes up the draw; a portion of the claim is passed by this. Otherwise, I saw nothing on the Charleston Spur claim. In addition, I found two relatively recent bulldozer cuts on the Charleston 24/39. One is on the very east end of the claim and the other one is a quarter-mile west of it. There was no apparent removal from these cuts. I also saw older -- what appeared to be older bulldozer cuts in the 13A and 11 portions, as shown on exhibit G-2. Again, there did not seem to have been any removal, although a lot of this is in the draw and it would be hard to determine. By referring, however, to the aerial photograph dated April 15, 1965, none of the work to which I have referred shows on

the ground within the limits of the claim or outside the limits of the claim on the south, the road. The bulldozer cut is not here on the east end of the claim, neither is the bulldozer cut a quarter-mile to the east, indicating that up to 1965 nothing was done on the bulk of Charleston 24/39 claim. Now, there may have been some work done in the very west end of it, but I have no personal knowledge of who did the work or exactly how much of it may have been done.

Q Were there sufficient openings, either man-made or natural, to enable you to determine the extent of the sand and gravel deposits on either of the contested claims?

A The openings were so limited that they could only be referred to the areas in which they existed and then, by conjecture, or by extension, by looking at the surface and comparing it with what was seen in the

opening, one could say that at least on the surface and perhaps for a few feet down, most of the Charleston 24/39 claim contains sand and gravel of various types and qualities.

Q Were you able to determine how far down the deposit would go, from the openings on the claims?

A As I recall, the deepest bulldozer cut, the one that is about a quarter-inch -- a quarter-mile west of the east end line of the claim was very nearly 15 feet deep when it was first dug. That was the deepest hole, aside from some of the draws traversing the area and some of them will get 10, 15 even 20 feet deep, and they are in sand and gravel.

Q All the way to the bottom of the excavation?

A All the way down, as far as I saw. On Charleston --.



Q Before you go on, were you able to discover from that how far down the sand and gravel deposit goes?

A No, not completely. You could only determine -- you could only be sure to the depth you could see.

Q But you had no reason to suspect it may extend farther down?

A It could extend quite deep.

Q How about your other -- the claim to the west?

A That would not be true of Charleston Spur. I have no idea of the actual depth of the sand and gravel in the three acre portion in the lower portion of the claim. Since this is a dry wash, the limit of this might be less and more confined than the sand and gravel out here on the Charleston spur where the topography, the preexisting topography before these eroded materials were laid down, spreads out. In other words, you



could have a little more deep deposit here. On the upper portion of the Charleston Spur no. 1, there is essentially no sand and gravel.

Q One of the charges filed against the contested claim is that valuable minerals have not been found within the limits of each claim which would constitute a valid discovery within the meaning of the mining laws. Do you concur in that charge as filed in the Complaint?

A I do.

Q State specifically, and in detail, why you so concur.

A A discovery of valuable mineral, by referring back to the prudent man clause, requires that you must have sufficient material as would warrant a prudent man, in the expenditure of his labor and means with a reasonable prospect of success in developing a paying mine. That discovery carries with it



marketability, especially on sand and gravel, since the passage of Public Law 167 on July 23, 1955. Now, marketability, actual marketing, tends to show that there is a market for the material. The market must be available. It does not appear there has been any marketing of this claim, or these claims at any time. If there has, it could not have been in large quantities.

Q What would be the market for the material for the contested claims?

The principal market would be in the Las Vegas Valley and probably, again, as fill material or perhaps as construction materials.

Q What would be the haulage distance?

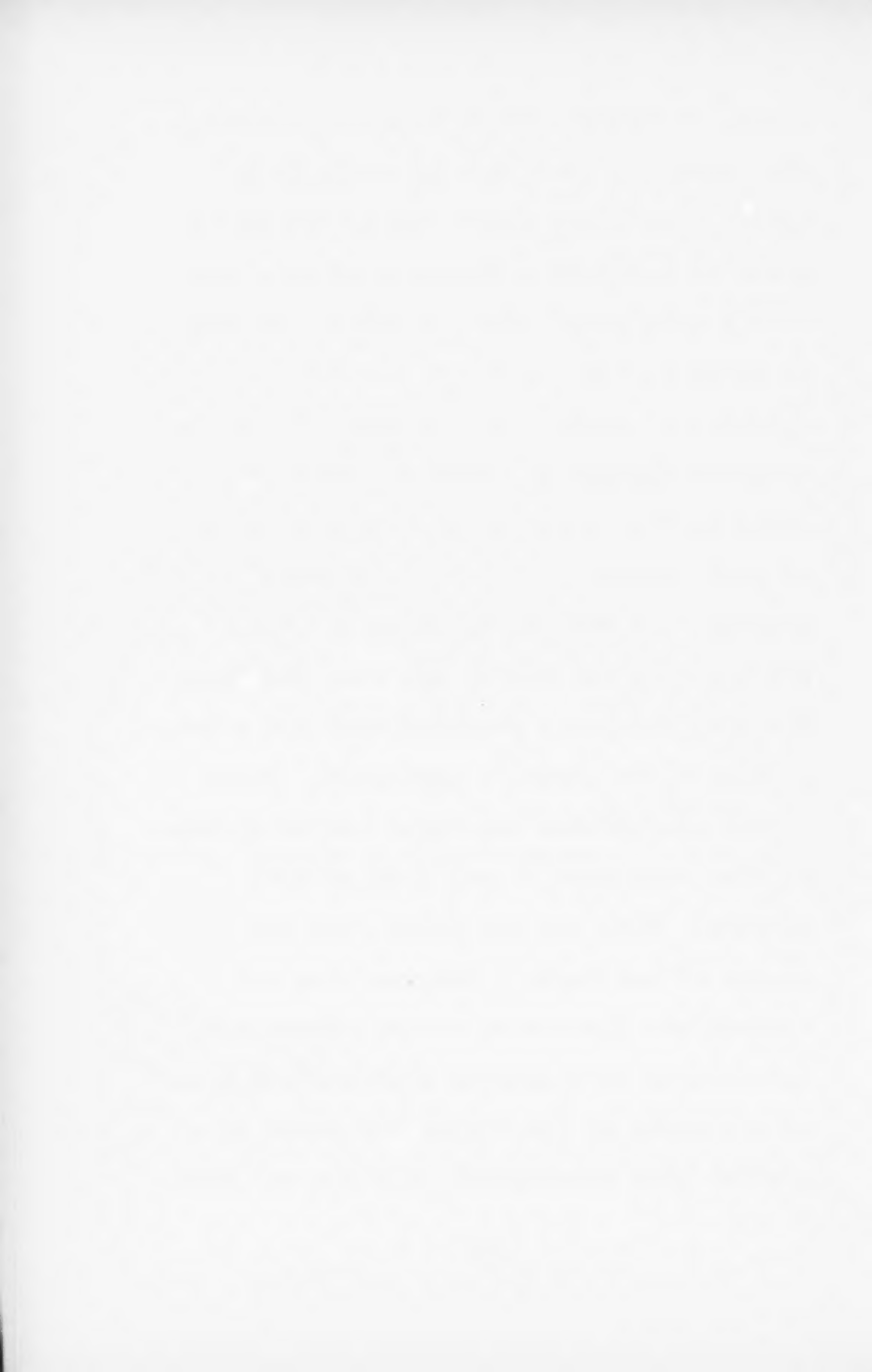
A The haulage distance to the center of town would be about twelve miles.

Q But you're not going to haul that material to the center of town. The center of town has been built up, has it not?

A It has, and if you compared it with -- then you compare the haulage distance from these claims with haulage distance from other operations in the Las Vegas Valley. On exhibit G-1, we have Nevada Ready Mix plant which is on the east side of the Valley. It is shown by a diamond and "Nevada Ready Mix." That, from Las Vegas -- again, from the center of Las Vegas, is a matter of about seven and a half miles. But the town has been built up considerably to about this area so that some of the market at least would be no more than a couple of miles. This is one of the two major producers in the Las Vegas Valley, by the way. The other major producer -- largest producer of the two -- I said that misleadingly. On this side, it is probably the largest producer; it is one of the two largest producers. The other is Wells Cargo on the east -- on the west side of the Valley. Now, Wells Cargo, radially



again, is thereby about seven miles from the center of town, but it is built up again, so that at least some of the market could be at least a couple of miles, less than a mile away. The --- WMK and Stocks as shown on the southwest, in the southwest quadrant of exhibit G-1, produce primarily concrete aggregate. They are about seven and a half or eight miles from the center of town, radially. In the southwest quadrant are WMK and Mendenhall. They produce sand and gravel and also Las Vegas Building Materials produces sand and gravel primarily for concrete aggregate. These claims are between Las Vegas and Henderson, so that they make -- may draw on both markets. They are ten miles from the center of Las Vegas. Now, working out towards the Charleston claims, there are subdivision developments within about five or six miles of the claims and there is a trailer park development, and I'm not sure



whether it's the homes in here or not. If they are, they're closer to the highway than is the trailer park; a few homes out here. So they're within, then, 1, 2, 3, 4, about 5 miles from the claims. So that by a factor of at least five miles, they would have -- from the Charleston claim, there is, you might say, a dead haul distance of five miles over what almost anybody else would have to haul, so that in terms of competition, they would have to overcome the extra haulage distance, either by efficiency of operation or by better management or by bigger sales in a proper quadrant of town.

Q Do you have any opinion as to the haulage factor with respect to the contested claims prior to July 23, 1955?

A The town was smaller then and by that very face, the competitive problem of haulage distance was probably more of one than it is today.



Q The other charge filed against the contested claim is that no discovery of a valuable mineral had been made within the limits of each claim, because the mineral materials at the present cannot be marketed at a profit now and could not be marketed at a profit prior to the Act of July 23, 1955. Do you concur in that charge?

A I do.

Q On what basis do you so concur?

A Since July 23, 1955, sand and gravel have been taken from the category of locatable minerals under the General Mining Laws, so that on July 23, 1955, the -- a discovery must have been demonstrated as of that time.

BY THE HEARING EXAMINER: We will be in recess till 20 to 11.

(Recess taken)

BY THE HEARING EXAMINER: The hearing will resume.

BY MR. AHO: Do you recall what you were saying before the recess?

BY THE WITNESS: I believe I do. The problem of -- I think you'd better rephrase the question.

BY MR. AHO: I won't rephrase it. I'll repeat it.

BY THE HEARING EXAMINER: Was it the second charge?

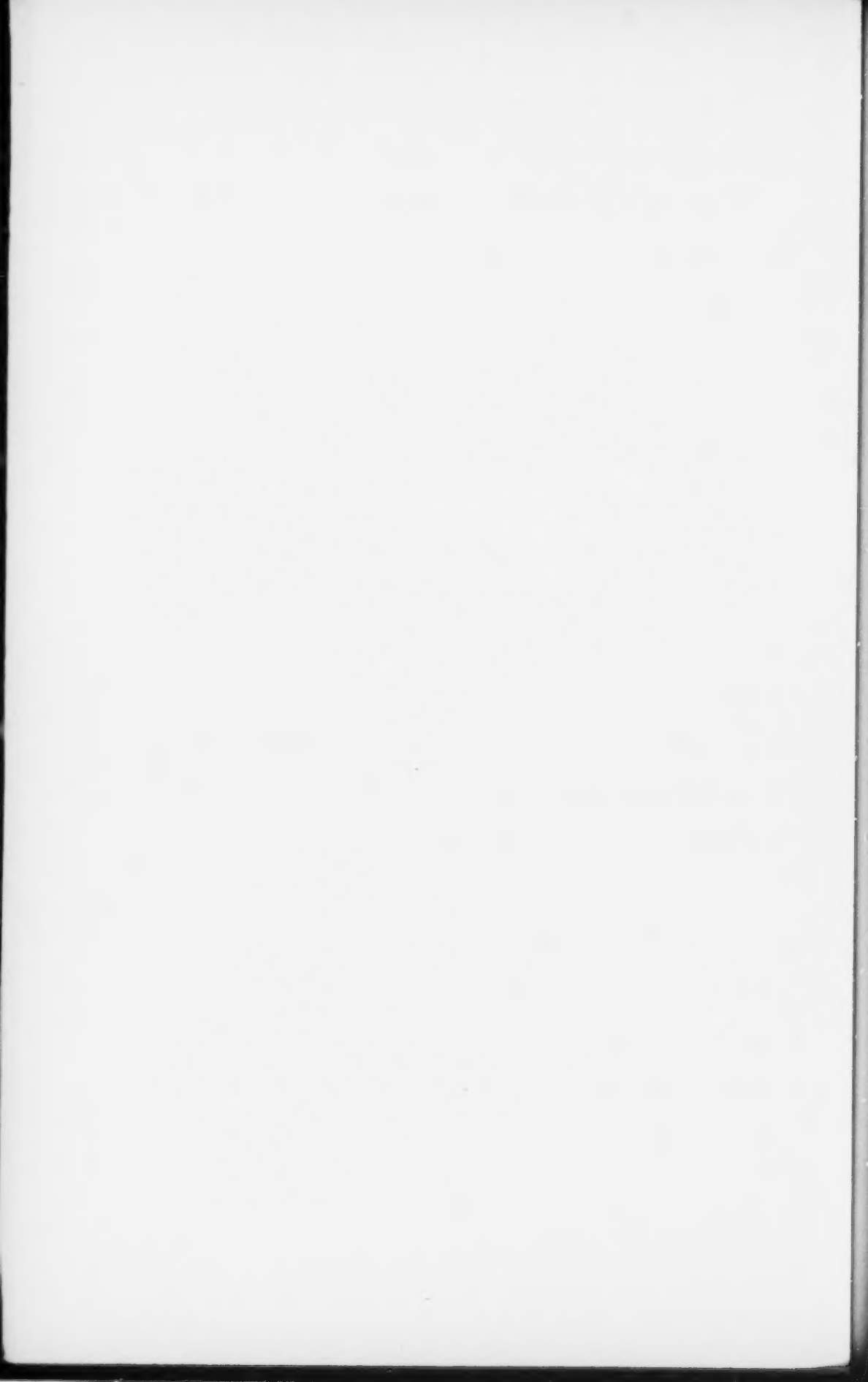
BY MR. AHO: Yes.

BY THE HEARING EXAMINER: Why don't you just look at the second charge, Mr. Schessler, and testify with respect to it.

(The witness examined the Complaint.)

BY MR. AHO: I asked if you concurred in the second charge, and upon what basis did you so concur.

BY THE WITNESS: I indicated that I did concur and the reasons are: decisions have indicated and what I understand of the law, there must be a present market and market at the time of discovery to



establish a discovery on a mining claim and more or less continuing market for the material. This relates back to Public Law 167 again of July 23, 1955, and as of that time, the claim could not be validated since, by discovery. Discovery is tied to the present market and to a more or less continuing market, based on this July 23, 1955 date. By referring to exhibit G-3, which is a 1965 picture, it indicates, and I saw nothing to argue with this, that there had been no material produced or removed from either the Charleston 24/39 or the Charlston Spur no. 1 all the way up to April 15, 1965. My ground examination on January 22 and February 11, 1971 indicated that as of that date there had still been no material extracted, removed or marketed and this, in substance, is why I must agree with the charge as made.

Q Based upon the study that you made prior to your actual examination of mining

claims in the Las Vegas Valley with reference to the market as of July 23, 1955, do you have any opinion as to whether or not the material on either of the contested claims could have been marketed at a profit prior to July 23, 1955?

A Well, I don't think it could have been; the basic reason, of course, being that it was not, and there were operations very near by, at times during a period all the way from the 1940's, the World War II years right up until the beginning of the 1960's. But those operations took place mostly in the draw, north of the claims -- north of the Charleston 24/39 claim and even those operations were sporadic and finally ceased. I would presume that haul distance had a lot to do with it in competition with other producers nearer to the city, nearer to the market. But again I go back to the contention that at the time there were operations and materials



easier to produce. One of the reasons being that there was a road to them very near by. The properties with which we are here concerned were not operated and there was thus no market demonstrated for the claims.

BY MR. AHO: I have nothing further of the witness.

BY MR. McNUTT: We have decided that I will do the cross examination and Mr. Sullivan would make a statement, presenting our case.

BY THE HEARING EXAMINER: You may proceed.

CROSS-EXAMINATION BY MR. McNUTT:

Q In essence, what you have said, that there is very good gravel in Charleston 24/39?

A Yes.

Q You didn't determine the depth, but it could possibly be as much as 5 or 600 feet in depth?



A Yes, it could.

Q You also concluded that there was no market in 1955 for the gravel from this claim, in your opinion?

A With the question phrased that way, my reply is yes.

Q But you say this because -- let me rephrase that. You have been in the Las Vegas area since 1966, I believe that is correct. Prior to that, you had never been in Las Vegas?

A Only passing through, a couple of times, back about 1954, 1955, 1956, somewhere along in there.

Q In the course of your endeavors as a mining engineer for the Bureau of Land Management, do you review the market sales of sand and gravel deposits in the greater Las Vegas area?

A I do.

Q And you find that they have been fairly consistent throughout the years, gradually increasing in volume?



A There has been a gradual increase in volume, but I wouldn't say consistent, no. There have been ups and downs. Some fairly radical ones. I wouldn't try to pin them down as to dates. However, I will say that today's production, that is, for 1970, it was reaching toward twice as much as in 1968 in the Valley.

Q So that, as of today, there certainly is a good market for gravel in the Valley?

A There is a total market in excess of 3,000,000 tons per year. Considerably in excess.

Q According to exhibit G-1, the map that shows radial proximity, there is a dashed line around the Las Vegas area. What does that dashed line indicate?

A It is more or less the city boundaries. In all truth, I haven't checked the exact boundary against the city map, but this is more or less a city



boundary -- the city limits. This map was made some time ago, in about 1965 or 1966, I believe so that the basic information on it, the lines, the Sections, the circles are what the maker of the map put on it at that time.

Q From your personal knowledge, you would say that possibly the dashed line encloses the urbanized area of Las Vegas?

A Yes, pretty much.

Q Taking specifically an example, Sky Haven Airport now known as North Las Vegas Air Terminal, if there was a construction project out there, the proximity to the Charleston 24/39 would be how many miles as compared to Wells Cargo's operations.

A Well, Charleston 24/39 we can count by using, say, the center of the claim or even the east end of it. That would be a bit more favorable. 1, 2, 3, 4, 5, about 5-1/4, plus 1, 2, 3, not quite 3



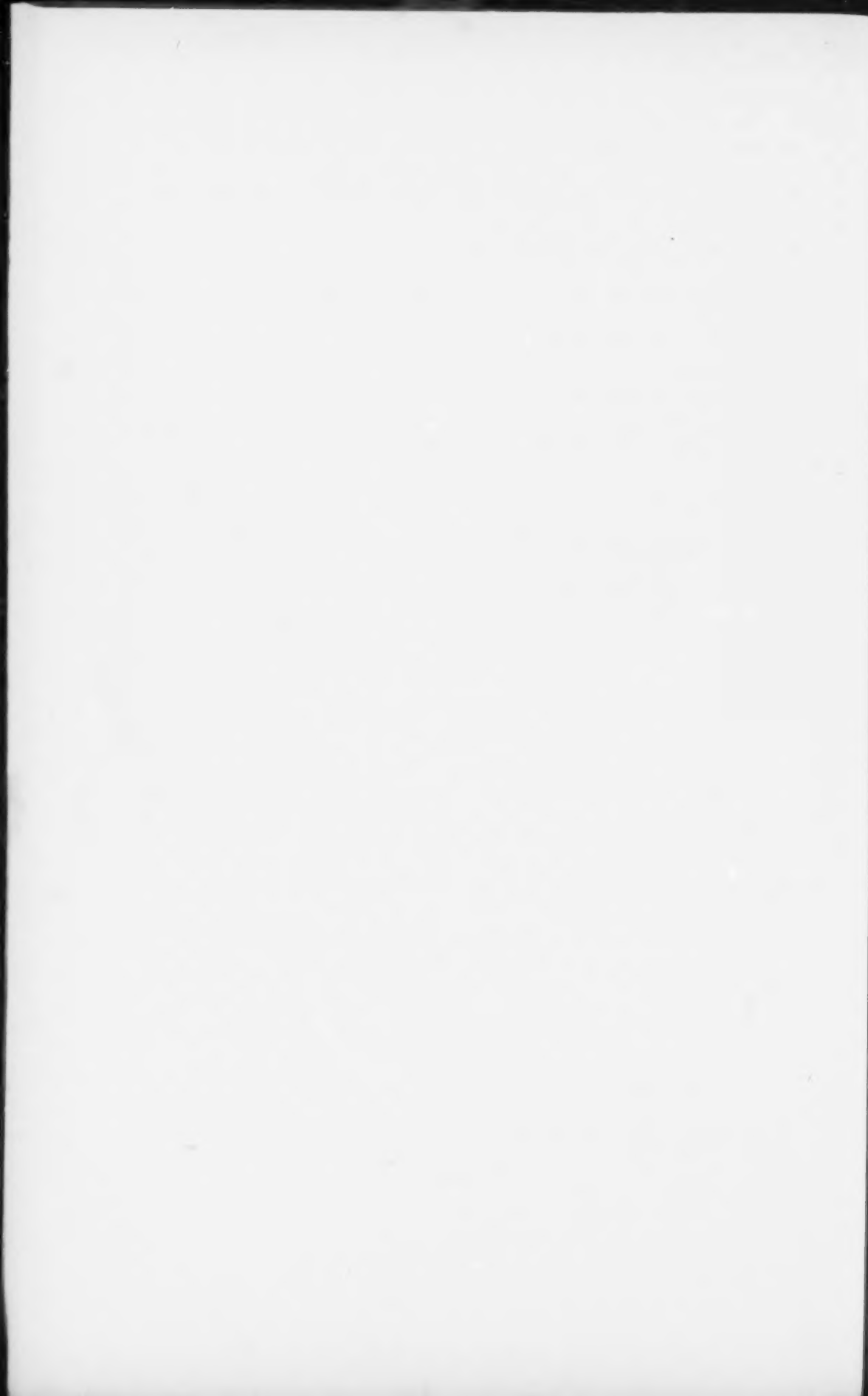
miles. So somewhere in the neighborhood of 8 miles -- 7 to 8 miles from the Charleston area and Wells Cargo would have to --. They probably would have to come up to Sahara, which would be a couple of miles, and then they would very likely have to swing east another couple of miles to Decatur, so there's four miles. And they would then go north approximately four miles, so that the distance from Wells Cargo or Charleston would be more or less equal.

Q Around what area?

A Sky Haven.

Q How many traffic signals would Wells Cargo have to go through, as compared to Charleston -- coming from Charleston 24/39?

A I can't answer how many, but any would be more, because there are none from the Charleston area.



Q You mentioned going north to Sahara, east to Decatur?

A Probably.

Q If I told you there was a signal at Sahara and Decatur?

A There is.

Q At Oakey and Decatur?

A Yes.

Q At Charleston and Decatur?

A Right.

Q At Alta and Decatur?

A Correct.

Q At Fremont and Decatur?

A Correct.

Q At Vegas -- Washing and Decatur?

A Correct.

Q At Vegas Drive and Decatur:
That's seven traffic signals.

A Correct. However, they would avoid those.

Q How?

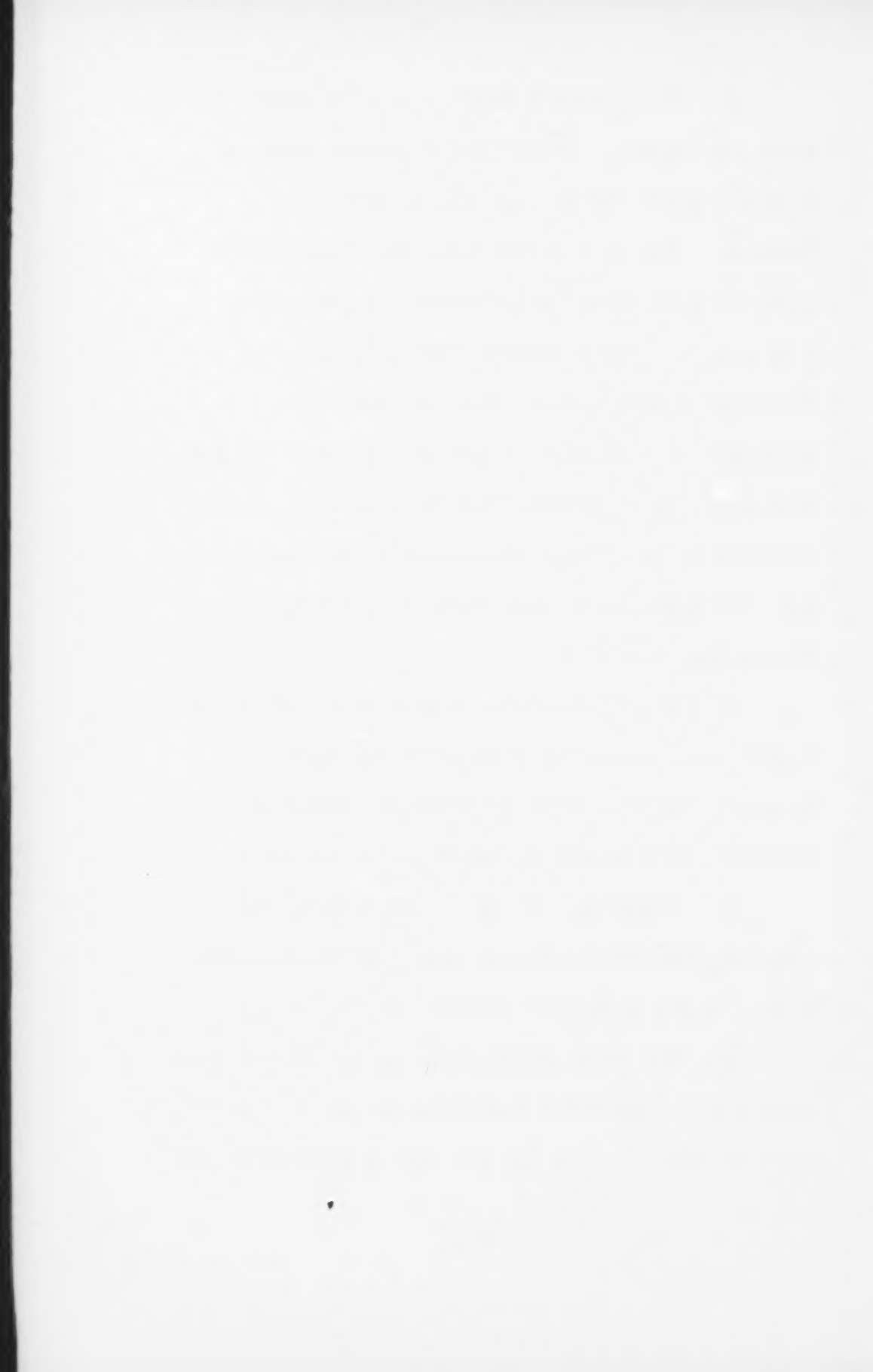


A They would have to go through an area of homes. They could avoid some of these lights by going out Jones from Sahara. No, not from Sahara, they would have to get from Charleston, I believe. I'm not too sure which roads have been put through where here. But in essence, because of traffic, they would have to go through the traffic lights because of the community problems that would be involved, so although it's the same distance, it would be --.

Q Eight traffic signals -- or seven traffic signals as compared to none. Right? Which, with attendant traffic delays, you would concede that as well?

A That is correct, and that, of course, would increase the ton mile cost. There's no question about it.

Q So that specifically on North Las Vegas Air Terminal reflecting Wells Cargo versus Charleston 24/39, the marketability



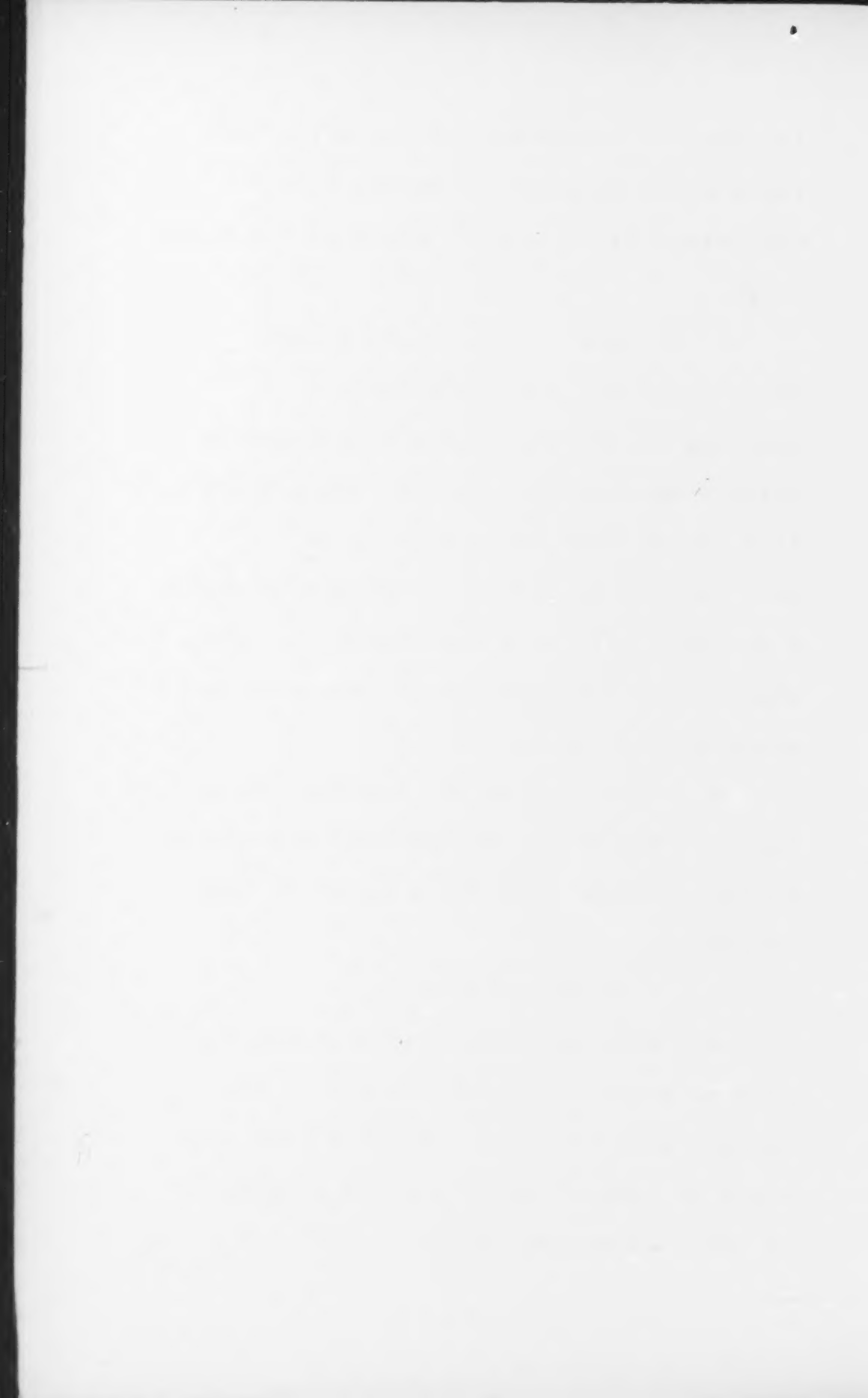
incident -- incidence, if you will, the index would be greater, better for Charleston 24/39 than it would be for Wells Cargo.

A I have to qualify my answer. Wells Cargo has a going operation. Anything on the Charleston would have to begin from scratch. So that there would be that factor that would have to be considered. As far as marketability index, I wouldn't call it a marketability index, I would call it a transportation factor as it would affect the market.

Q Then, let us say transportation factor. You would concede that Charleston 24/39 is better than Wells Cargo in that respect?

A I think I'd have to.

Q Now, you mentioned that you could find no signs of removal in any of the eastern area of 24/39. You did find some signs of removal in 11 and 13A components of that, referring to exhibit G-2.



A I don't believe I testified to any signs of removal, as such. I testified to signs of some activity. In other words, bulldozer cuts on the west end of 13A and 11. As to removal, I would hesitate to say, and yet there was some. The evidence is slim that it was in any large quantity, but I am dealing now with the claim itself. There are signs of removal, and in relatively large quantity, very near by. In fact, practically bordering on the Charleston 24/39.

Q Let us talk about the boundaries of the claim. Was that actually surveyed?

A The land has been surveyed, and I did see Section corners, quarter corners and Sections corners out there on which to base my location on the ground. In fact, one of the corners is shown on the aerial photograph, and this is this point right here, this south 16 quarter of Section 36. That is visible as a little, white el



shaped patch immediately on the edge of the red line here and that consists of either a lime patch -- it looked like a white lime patch placed on the ground prior to the time the photograph was taken. So that coded corner is positively located on the photograph. It shows. That is the east end line of 24/39.

BY THE HEARING EXAMINER: It is a vertical line on the east end of the exhibit.

BY THE WITNESS: That is correct. Near the center of that line is that little while el shaped nick, if you will.

Q (By Mr. McNutt) You would surmise, of course, that it was placed there by field crews, ground crews to aid and assist in the aerial photography.

A I would assume so, yes, because it shows up quite well on the picture. There are, of course, a lot of little white patches on the photo which do not represent



these things but I happened to visit this one on the ground and there it was.

Q Referring to exhibit G-3, you mentioned that as of 1965, the date of exhibit G-3, you could see no evidence of any removal of gravel, any work at all being done in 24/39.

A Not any work at all, but as to removal, in the interpretation of the photo itself, I would have to state that there is nothing showing on the photo indicating removal. Nothing that you can see of what, is, or may have been.

Q Do you see anything in there that indicates work being done in 24/39 by bulldozers, excavators, or anything such as this?

BY THE WITNESS: In 1965, the date of the photo, or previous to that?

BY MR. McNUTT: It would have to be previous to the photo because it's only going to show on it.



A What looks like what may have been a scraping in the very west end of the claim and there are little piles of material that are not too visible, but they can be seen here in the northwest portion of it. But in terms of excavation, its depth, what have you, you can't find anything on the picture. There is no indication of any substantial removal.

Q What you are saying is, that the photograph is a flat photograph and does not give you the relief you would need to determine depths for excavation.

A It does not give me the relief and it does not give me the contrast on which to see it. Also, I might point out that this is a mosaic, and although it is frequently difficult to determine the mosaic pattern where they have to lay photos against one another -- this is a number of photographs placed together and rephotographed. Now, this is an obvious

mosaic joint, here. There is what possibly appears to be here -- these people have been very good at their work. They have used differences in shading on the photo to help make their mosaic. There may -- I'm not sure of this -- but it looks like here there is even a joint. It's a little difficult here to say just what is what.

Q Do they not normally make these joints at roads or streets in the process of making a photo mosaic?

A No, they don't, not here. Especially when you're dealing with large areas of country such as this one. Look at this one, that is an obvious joint, but it becomes less obvious down here.

Q But this joint also follows a road further along?

A I think that's more or less true. I'm not aware that they do this all the time.



BY THE HEARING EXAMINER: The work that the witness has been discussing is in the lower right hand corner of exhibit G-3, the joint.

BY THE WITNESS: That is correct.

BY THE HEARING EXAMINER: You may proceed.

Q (By Mr. McNutt) To come back to what is known as 11, part of 24/39, where you were mentioning the excavation that you saw and can recognize, this is immediately adjacent to a road, is it not?

A It is.

Q It would have immediately available transportation without any other problems?

A That is correct.

Q Continuing on along to 13A which is again a part of 24/39, identified somewhat separately, the road passes through that area as well, does it not?

A It does.

Q Is there any evidence of excavation in that area?

A I have another note on the map here on which I have located some of these.

Q I am referring now specifically to the photograph. From your own personal viewing of the photograph which is what you based your previous testimony on.

A Photograph, no.

Q There is no evidence of excavation?

A No.

Q I call your attention to this little white spot, right here. For the records, this is approximately in the center of the eastern portion of 13A, a white spot. What would you call that?

A I don't know what it is.

Q It could be an excavation?

A I am not at all certain what that is. I would question it being an excavation, but it could be. If you will



notice to the south, here, there are other white patches indicating possibly, either defects in the pictures that were used to make the mosaic, or what have you. I cannot say from this if that is an excavation.

Q Immediately to the west, to the left of that white spot we were talking about, is a slight bend in the road and there was a difference in gradation and texture there. Does that indicate specific excavation?

A It does, for the road, at least. Because the road here comes down off the hill, if I remember right. No, it does not. It is already in the draw, following along the side and continues here in this area. It is definitely a part of the road cut and a little bit wider.

Q So it could have been an excavation for gravel immediately adjacent to the road prior to 1965?

A It could have been.

Q In 1958 or 59 there was a large flood in this area. Would the flood have eliminated traces of excavation in that area? A rainfall that amounted to approximately six inches of rain in a matter of, I think it was eight hours.

BY THE WITNESS: I'm going to ask you to point out the area that you are talking about.

BY MR. McNUTT: I'm saying, generally in the mountainous area to the west of Las Vegas, there was a veritable cloudburst of rainfall, approximately six inches of rain falling within eight hours in the general area to the west. Is it possible that such a rain could obliterate excavations?

A Excavations in the draws, yes, but not necessarily up out of the draw.

Q The evidence seems to be then, that it's possible there was excavation and removal prior to 1965, the date of this



photograph from what you, with careful observation, have looked at?

A I would have to concede the possibility, yes, providing we are confined to the study of the aerial photograph. The aerial photograph, taken alone, that possibility does exist.

Q But you were not here prior to the photograph?

A I was not.

Q And you have no personal knowledge of this?

A That is correct.

Q And all your deductions have been based upon this aerial photograph?

A That is correct

BY MR. McNUTT: I have no more questions.

BY MR. AHO: I have just some redirect for clarification purposes.

REDIRECT EXAMINATION

BY MR. AHO:



Q We have been referring to plot 11 and plot 13A involved in the Charleston 24/39 claim.

A That is correct.

Q 13A and number 11 are Charleston placer claim 13A and Charleston placer claim 11, are they not?

A That is correct.

Q And the claim involved in this proceeding, 24/39, overlaps Charleston claim 11 and Charleston claim 13A. That is correct?

A That is correct.

Q And Charleston claim 11 and Charleston claim 13A are presently owned by Charleston Sand --.

A Charleston Stone Products.

Q And they have also been contested in another proceeding, have they not?

A They have.

Q And decision thereon is still pending, is it not?



A I haven't seen it yet, so I presume it is, yet.

Q But, insofar as your exhibit G-2 goes, you are just trying to show that the contested claim in this proceeding does overlap 13A and claim 11?

A That is correct.

BY MR. AHO: That's all. I have no further questions.

BY THE HEARING EXAMINER: You may be excused then, Mr. Schessler. Do you have further testimony?

BY MR. AHO: No. No further witnesses, either.

BY THE HEARING EXAMINER: The government has rested its case and at this time, Mr. Sullivan, you are entitled to present evidence on your behalf, as contestee.

FRANK R. SULLIVAN, having been first duly sworn to testify to the truth, the whole truth and nothing but the truth, testifies as follows:



BY THE HEARING EXAMINER: We will be off the record.

(Off the record discussion held.)

BY THE HEARING EXAMINER: You may proceed, Mr. Sullivan.

STATEMENT BY MR. SULLIVAN

BY MR. SULLIVAN:

Well, I'd like to refer to this map that we have here.

BY MR. AHO: Which one?

BY MR. SULLIVAN: The one on the wall, exhibit G-3. And show you some things that are a matter of record here, and why it's been changed. Now, right in here we had a big excavation which carried over into my claim, and I didn't know exactly where this location or this mining claim was now, the corners, until I had it surveyed. That's why he was able to detect where these were marked off because I outlined it after I had it surveyed.



BY THE HEARING EXAMINER: Will you please put an "E" by the excavation that you just described.

BY MR. SULLIVAN: This one right here. The biggest one. An "E?"

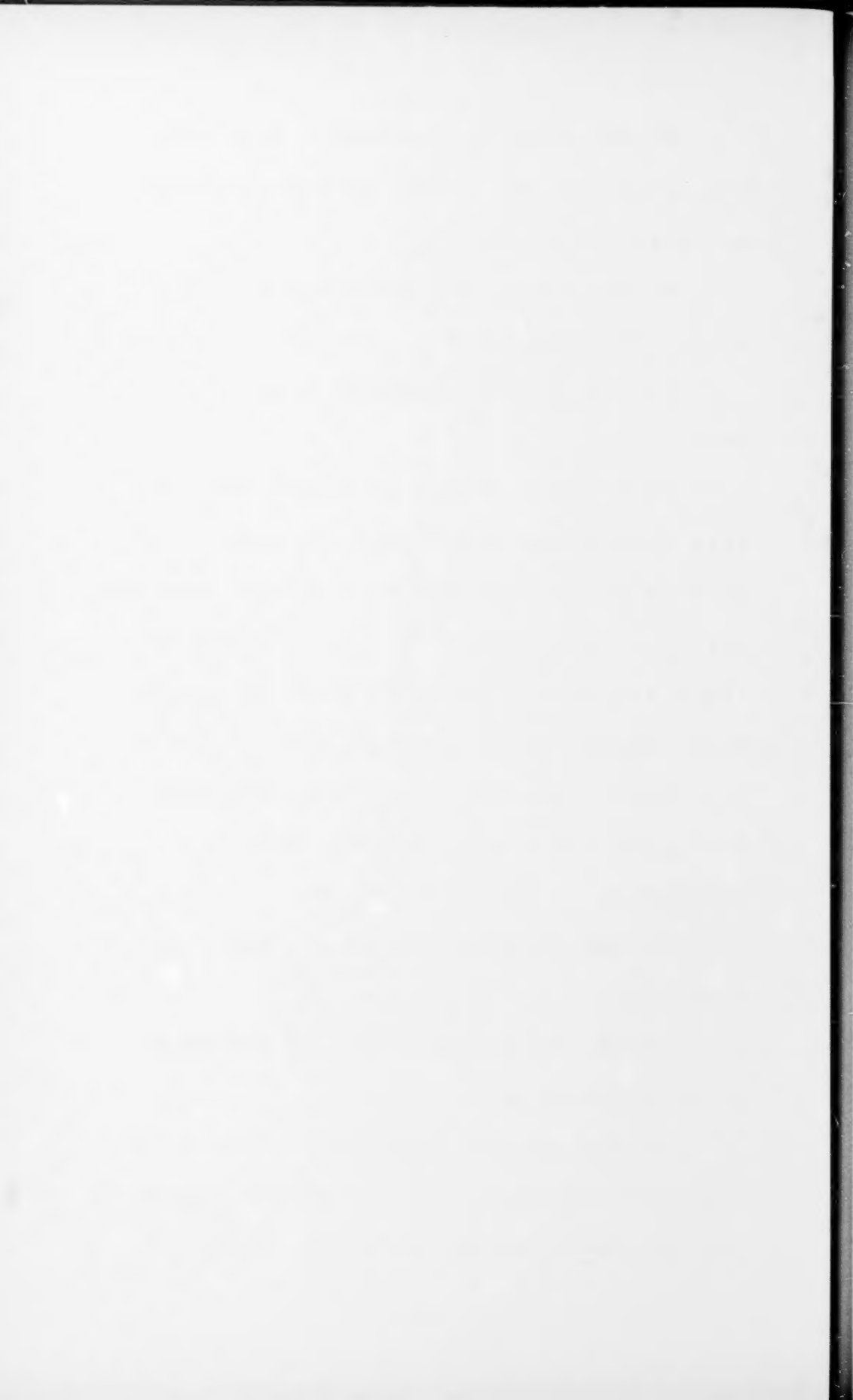
BY THE HEARING EXAMINER: A red "E," yes.

BY MR. SULLIVAN: At this time that this excavation took place, we thought we were on our claims and we did come into the corner. Now, this is the big excavation there and that's about 20 feet deep. It does come up onto my claim, it's quite a bit there. Right there, this wash down here, the big flood that Mr. McNutt mentioned.

BY THE HEARING EXAMINER: Now, that is a wash?

BY MR. SULLIVAN: This is the main wash, right here.

BY THE HEARING EXAMINER: That's to the left and along the top of the claims on the northwest corner of 24/39 claim.



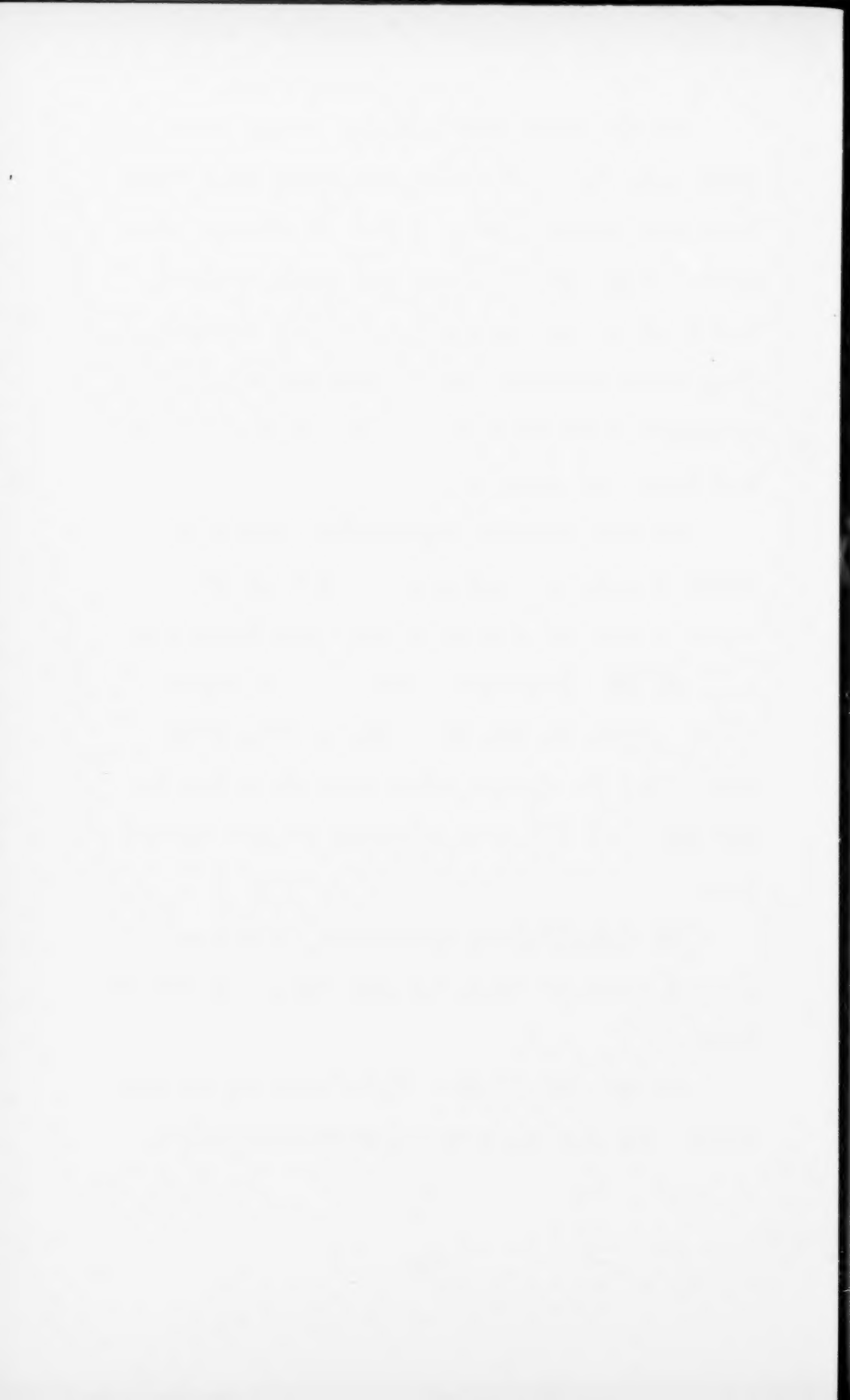
BY MR. SULLIVAN: Right here, they come together. This is the main wash right here and comes down. I had to change this road. I'm the one that put this road in and I have the record. I had to change this road because that flood washed out all evidence that we had in here of excavation and took the road out.

BY THE HEARING EXAMINER: Would you place a general indication in blue on exhibit G-3 of the wash that you have --.

BY MR. SULLIVAN: Well, it's right here. This is the main wash, down here. And I had to change this road in order to get up over the hill because it was washed out.

BY THE HEARING EXAMINER: Place a little line in red, if you can, instead of blue.

BY MR. SULLIVAN: This used to be the road. Do you want me to show the road?



BY THE HEARING EXAMINER: Yes, just generally.

BY MR. SULLIVAN: The road used to come right here.

BY THE HEARING EXAMINER: That is a red line again in the northwest corner of the 24 claim, generally.

BY MR. SULLIVAN: There is evidence, there used to be a building sitting right here. A shed.

BY THE HEARING EXAMINER: Place a "B" at the point you have just described.

BY MR. SULLIVAN: I don't think there is any evidence there.

BY THE HEARING EXAMINER: No, just indicate the location of that point "B."

BY MR. SULLIVAN: So we had to change our operation and moved in this area which you can see right in here.

BY THE HEARING EXAMINER: Place an "A" where you indicate an area.



BY MR. SULLIVAN: We moved our stockpiling area.

BY MR. AHO: I think when you say "we did this" and "we did that," you'd better try to give the year and month that it was done.

BY MR. SULLIVAN: This was in --. What year did you say the flood was?

BY MR. McNUTT: 1958.

BY MR. SULLIVAN: In 1958 this took place. We had a crusher up there. A big crusher sitting in the wash here.

BY MR. AHO: When?

BY MR. SULLIVAN: I was in 19-- , about 1958. We had to move it out on account of vandalism. We had a big generator; we had an \$8,000 generator we had, to make our power. It was stolen. So what we did, we moved this operation out of here and we come in and dug excavations, hauled it out with a truck, but we didn't process it here any more. Because of the vandalism and



that, we moved our operation down to a place in North Las Vegas and hauled into there, screened it, and stockpiled it there, and hauled it out to Nellis, the City of North Las Vegas and this is where we made our --.

BY MR. AHO: When?

BY MR. SULLIVAN: This was -- this has been going on ever since --.

BY MR. AHO: I mean, after 1958?

BY MR. SULLIVAN: No, this has been going on -- I have been selling gravel from this ever since I got -- but the operation has not been taking place here. We moved the crusher out. We moved it out completely.

BY MR. McNUTT: Frank, what we are trying to find out is the dates.

BY MR. SULLIVAN: I moved the crusher out in 1957. Do you know when the County put in the sewage disposal plant? This is when I moved the crusher out. Right after



that, the vandalism was so bad, they cut two belts off, and I had to move it out. And this is when I got a screening plant, sold the crusher, and moved it down home where I could work, and I sold the gravel off these claims right in this area right here, right in the wash, right here and right in this area right here in the wash, I sold gravel out of there and I also -- let's see -- right in the area right here, I sold an awful lot of gravel out of this area. Now, most of my operation was in this area, in this wash right here.

BY MR. McNUTT: For the record, that is 11 and 13A area of 24/39 claim.

BY MR. SULLIVAN: This is where I would take most of my material, because at that time I didn't have a cat that would dig that hard of a material, so I got it out of the wash. And there is some evidence there yet, a little.

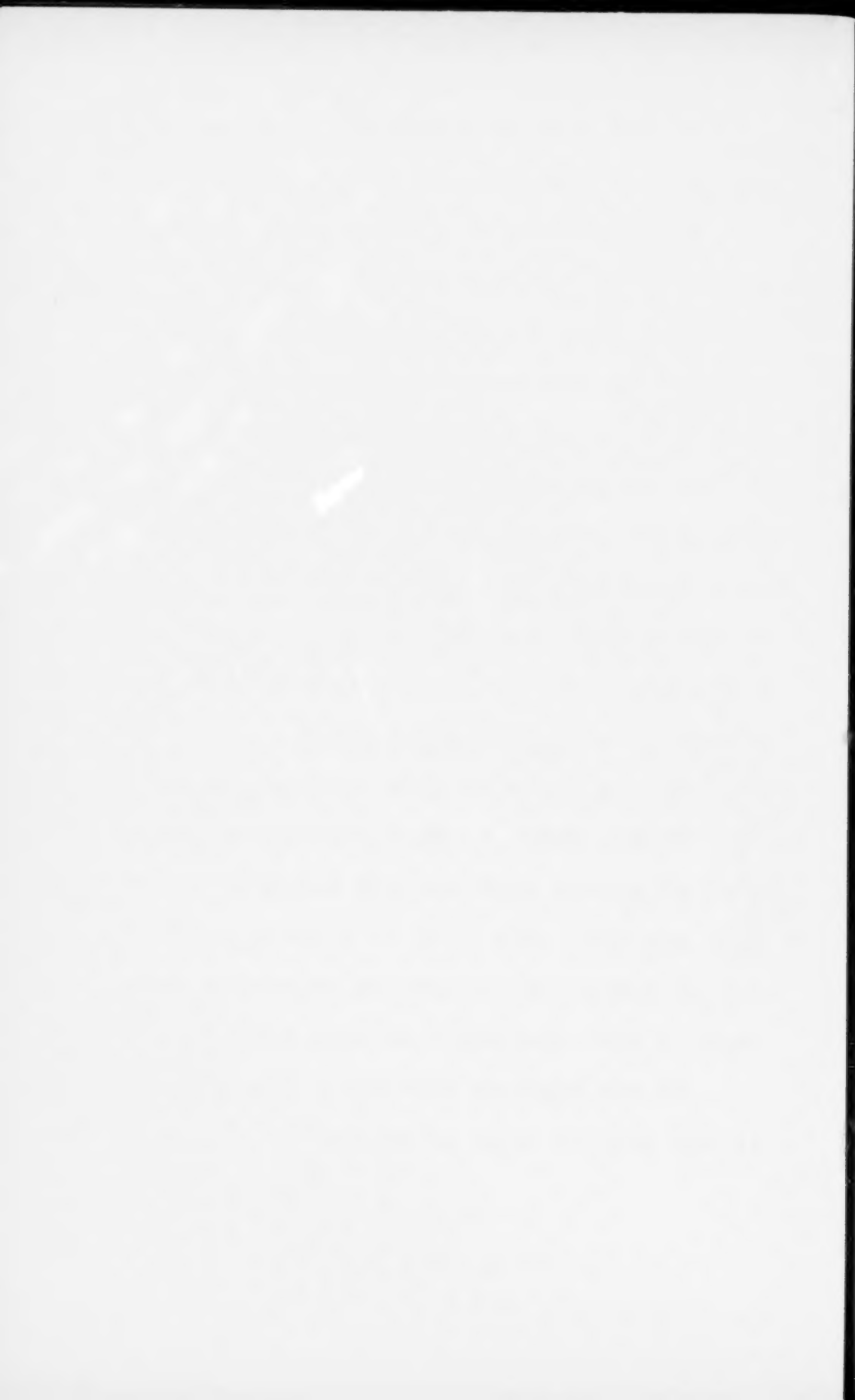


BY THE HEARING EXAMINER: Did you have any further statement to make?

BY MR. SULLIVAN: Well, since this aerial photo has been put in, I have outlined these claims and have put exploration places on them in the places that I could get to with the roads that I put in, which would show, visible up there, should be, unless the floods and the rains have destroyed it. The things that I put on the ridges is still there. You can still see them, but I didn't haul off the ridges. I did some exploration -- dirt exploration there to show evidence of --.

BY MR. McNUTT: What constitutes doing work on claims that are not being produced when you used this area to produce gravel out of and you are figuring on moving down here is your equipment to move with ---.

BY THE HEARING EXAMINER: "Down here" is the eastern area of 24/39.



BY MR. SULLIVAN: This is the best gravel. We tested this here. At one time, I owned all this area. Not just this right here, but the people that you are contesting on the other claims, I owned the whole thing and bought it all from Mr. Browner. I took it on a foreclosure, is what it was. I lent him money to get in on his operation here for sale of gravel to Nellis, to the City, Mercury, it was hauled all over the country from these claims right here at one time. And when he got sick, broke his leg and he was working, I lent him the money to operate with, and he later deeded it to me for this obligation. And the gravel sales off this property has gone on day and day -- I mean if a guy come to me for a specific type of gravel, with this gravel that I was producing, I mean you can't get it any place else in this Valley. There is no place that will match this gravel



production for quality, because it doesn't have to be washed. All that has to be done is screened. It doesn't have to be crushed. All that has to be done is just hauled out in a truck and it will meet the specification the FHA has for requirements for rock material. Just a few years ago, I hauled 3,000 yards to Nellis, just one contract. It was all processed in my place. We couldn't process it up there because I lost so much money that I had to move it out. I can prove that this operation went on there because I have pictures and I have receipts showing where I sold gravel.

BY THE HEARING EXAMINER: Now the area that you have indicated, is that in the best gravel, or the eastern end of the claims? Would you please place an "X" at that area.

BY MR. SULLIVAN: Well, I can't tell from this map, but I believe right in here



is a tank, isn't there. Right there. I built this road across. That kind of sets right there. Is this the way it is?

BY MR. McNUTT: It's here.

BY MR. SULLIVAN: This is an exploration hole here.

BY THE HEARING EXAMINER: That's off the claim?

BY MR. SULLIVAN: Well, it's in the claim's general area, on the same fill. We dug a test hole there, 680' deep, and we're still in gravel. We dug a hole in this claim right here, I believe it's 3,000' deep.

BY THE HEARING EXAMINER: That's the Spur claim.

BY MR. SULLIVAN: 2,700' deep and we hit gravel 80' deep on this -- right on the edge of this. This here shows the border. I don't know whether you saw it where we leveled that off right here. You can see it from driving up there.



BY MR. SCHESSLER: Am I at liberty to answer?

BY THE HEARING EXAMINER: Well, no, not at this point.

BY MR. SULLIVAN: Well, you can see it by driving up there. This road gets washed out all the time and it's all loose granule material. No good for road beds, and you can't use it. You get stuck there when you go up with a truck. So I got self loading scrapers and I come up there on this gravel claim up here and make new roads with my cat, come in here and picked this gravel up, haul it down this wash and put it on this road that goes up this creek here so that I could get up and haul it. I was working here for six months at one time. There is evidence, all kinds of evidence, there was, a few years ago, of exploraton diggings on this claim and I think if you go there visually, you can see some small mounds, but in the wash itself they would be all gone on account of the flood.

BY THE HEARING EXAMINER: Would you please take the witness chair, Mr. Sullivan. If you have now completed your statement, Mr. Aho is entitled to cross examine you.

CROSS EXAMINATION

BY MR. AHO:

Q When did you acquire the contested claims here?

A I had them in my possession for quite some time before I recorded.

Q But did you take them over after Frank Browner ceased operations?

A Not immediately, no, sir.

Q He went out of business about 1958, did he not?

A In that area, some time. I'd have to check my records and see.

Q To the best of your knowledge, Browner went out of business and you took the claims over?

A Yes, sir.

Q Did you take over all of the Charleston group of claims?

A Yes, sir.

Q That is Charleston group of claims shown on exhibit G-2 that are marked 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12A, 14, 15, 16, 17, 19, 20, 21, 22. Right? That's the Charleston group of claims.

A That's right.

Q And you went in, acquired those claims some time, say in 1958.

A It was immediately after that, that I recorded them, I'm sure.

Q And did you acquire title to all the Charleston group of claims.

A Yes, sir.

Q You sold them all to Charleston Stone Products except the claims you own now?

A Yes, sir.

Q And this big pit that you marked "E," the large excavation on Exhibit G-3, that is actually on claim 17, isn't it?

A Well, it comes over into --.

Q Just a little cornering on your 24/39 claims, doesn't it?

A You're talking about sales --.

BY MR. AHO: No, I'm talking about the big excavation. You marked this "E." A large excavation.

BY THE WITNESS: We thought we were on, but we missed just a little.

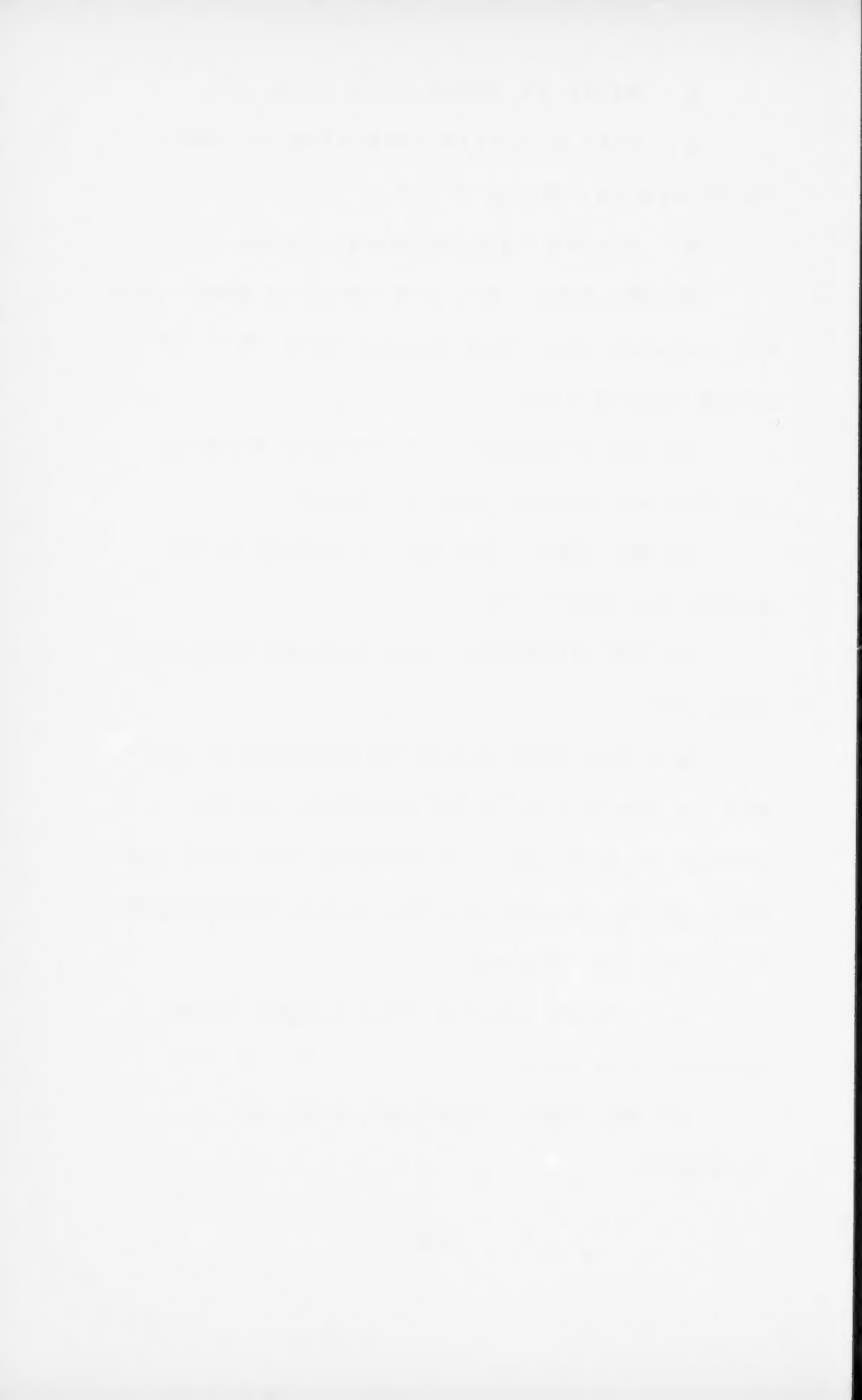
BY MR. AHO: but it is actually on claim 17, isn't it?

BY THE WITNESS: the biggest majority, yes, sir.

Q You were going to explain -- oh -- why is the claim 24/39 overlapping on claims 11 and 13A? I thought you said you were going to explain why these overlapped on those two claims.

A These people that bought these claims from me --.

BY MR. AHO: Charleston Stone Products.



BY THE WITNESS: Don't they say that those two claims are part of their claims.

BY MR. AHO: Right.

A Well, I didn't sell those two claims to them. I sold only those outside. They have no interest in those two claims.

BY MR. AHO: That's why there is an overlap at the present time and they claim title.

BY THE WITNESS: They have no jurisdiction there at all.

Q Do you know why Browner went out of business in 1958?

A Yes, sir, I do.

Q He went broke, didn't he?

A No, sir, he didn't.

Q He didn't?

A No, sir. He sure didn't.

Q Do you know he was sued for non-payment of rental on these properties?

A Would you like me to --.

BY MR. AHO: No. Do you know that?

A He was sued, but I know why he was sued, too.

Q And you say he didn't go broke in 1958?

A That's right.

Q He ceased operations, though.

A He ceased operations. I finished the job.

Q From whom did you acquire the claims.

A From Mr. Browner and his wife.

Q Did Browner actually own the claims, or was he leasing them at the time?

A No. He had them.

Q He had full title?

A Full title.

Q And when he went out of business, you acquired title to the claims from Mr. Browner?

A There was never no lien ever put against the claims.

Q When did you sell everything -- all of the Charleston claims except your claims, to Charleston Stone Products?

A Well, it must have been right around 1963.

Q You had them five years?

A Yes, I had them five years. I forgot to check my records on this, now, because I don't remember. It's been quite some time since this happened.

BY MR. AHO: You see, we had another contest and I'm going to have the Examiner take judicial notice of the Hearing Examiner's decision of Grayden Holt regarding its Charleston group of claims which was rendered, I think, about November, December of last year. But anyway, I will, in a brief, make reference to that and we have the legal evidences as to when the Charleston Stone Products actually acquired the claims.



BY THE HEARING EXAMINER: Was there determination made as to ownership by that contestee of 11 and 13A?

BY MR. AHO: As far as I know, it was. Whether we stipulated that they owned, or whether they presented documentary evidence of their ownership, I don't recall. But anyway, whatever reference there was to ownership would be in that case and also as to date when Charleston Stone Products claim they acquired title.

Q (By Mr. Aho) Now, actually, most of your removals were made in the draws, were they not?

A At that time I didn't have big equipment. I did have small loaders, so I had to take that what was loose and available, and close to the road. The road went right by it, and every time a flood would come down, maybe once or twice a year -- one every two or three years, it would



come right back in and fill it and I would go right back and dig it up.

Q With a loader, you would go right down the draw and scoop it out of the draw?

A Yes, loaded it right off the draw. The road went right up the draw there, right across my claims there. There's where I did my selling of my gravel.

Q Are you in the sand and gravel business at the present time?

A At this time, in Las Vegas, I sold my business to my son in law and my foreman and they are operating and still run the business and they are hauling the gravel.

Q From these claims involved in this contest?

A Yes, sir.

Q They are doing the same as you did?

A Well, they haven't hauled any this last year. We hauled in about 11,000 yards

and stockpiled it and I think he's maybe got 30, 40 yards left of gravel -- pea gravel that he sells for houses.

Q I believe you stated you did stockpile some material on these claims, is that correct?

A Yes, sir, we did stockpile all the time, right here where this evidence is, right here.

Q That would be in about 1960?

A Well, when I owned all the claims.

Q Which is after 1958?

A Yes, after 1958. We stockpiled right in this area, right here.

Q You are pointing now off the western boundary of Charleston 24/39 claim?

A Yes, there are two stockpiles. One by this claim and one by this claim. There is evidence right there.

Q And that stockpile would be on what claim, as shown on exhibit G-2? Would that be on 10?



A Well, I would have to go up there and see, but I believe it is right up there.

Q That's claim 10 and claim 9. Actually, isn't the great big excavation out on the Charleston claim on claim no. 10?

A The last is, yes.

Q The great big one. Almost all the removal has been from claim 10, hasn't it.

A After I sold them, they went in there and excavated it, see. They moved a crusher in, of their own. They moved in above me and I was down below. They did that after they moved in.

BY MR. AHO: I have no further questions of this witness.

BY THE HEARING EXAMINER: Do you wish to make any further statement after this cross examination, Mr. Sullivan?

BY MR. SULLIVAN: I don't think so.



BY THE HEARING EXAMINER: You may be excused, then.

BY MR. AHO: I will recall Mr. Schessler for one or two questions.

REDIRECT EXAMINATION

BY MR. AHO:

A Mr. Schessler, you were present when Mr. Sullivan was testifying?

A I was.

Q You heard him make reference to a road on top of the hill at the west end of the claim?

A I heard reference to the road.

Q Did you see the road?

A May I describe it?

BY MR. AHO: Yes.

A I use exhibit G-3. I didn't go into this earlier, but the road to which we are referring is the one that Mr. Sullivan said he built on the west end of the claim. No argument who built it. This road leaves the draw approximately here --



it may be a little farther along, but it leaves the draw and goes up on the hill. As it goes up on the hill, it comes around right past the Section corner, 34/35, 2 and 3. This is on a hill and as soon as -- right after leaving the Section corner, it curves and goes back down and follows the hill. You can look out over from this hill and this light colored area -- when I was being questioned earlier, I'm sorry I forgot -- but that is an area along side the road, a kind of parking area, scraped area, light colored area. It is not an excavation. This is a hill. You look out over the excavated area at what is claim no. 10 as shown on exhibit G-2. In essence, this is the description of the road in the west end of Charleston 24/39.

Q You say that the whitened area common to Section 34 and 35 may have been a parking area used in connection with the large operation on claim 10?



A No. I would say it is simply a scraped off area as of now.

Q You heard Mr. Sullivan testify as to running the loader down the draw and picking up the gravel, did you not?

A Yes, I did.

Q Where does that gravel come from. Is it loose gravel?

A It is loose gravel from the wash. It comes 'way up -- that's a poor description -- but it is brought down by torrential rainstorms, flooding from time to time from the mountains to the west.

Q It is entirely possible the gravel was loose, you could shovel it up and you wouldn't know it had been shoveled?

A It is possible, but not very probable, because it -- you see the colored patterns on --

(Recess taken to change tape on tape recorder.)



BY THE WITNESS: To continue, what we were doing was dealing with the colored patterns on the aerial photograph as related to the possibility of excavations having been filled in by flooding. Now, I will point here on the west end of Charleston 24/39 in that vicinity on exhibit G-3. I point to the area which Mr. Sullivan has marked, I think, with an "A" here. And by referring to this pattern, notice the darker dots within the darker pattern. This is vegetation, creosote, even some yuccas, what have you, various small plants. They are very obvious in here. We extend this up a little farther to the west, just off the west end line of Charleston 24/39 and the large excavated area within Charleston no. 10 is quite visible and quite distinct. When we speak about the possibility of floods filling in these excavations, large or small, the excavation on Charleston no. 10 and the

stockpiles had existed in this place as affected by the wash, essentially the same as they are now, since I have been in the Las Vegas District. Flooding has occurred. Last year we had a rather severe flood. I don't think this picture would show too much different right now -- if it were taken right now, from what it shows in 1965.

Q When you referred to the large excavation on claim 10, you were referring to the claim 10 as depicted on exhibit G-2?

A I am. That claim 10, the excavation of that stockpile are overlooked by the road where it comes over the hill on the west end of Charleston 24/39. It passes right by the Section corner, Sections 34/35 and 2 and 3 as shown on exhibit G-3.

BY THE HEARING EXAMINER: Mr. Schessler, could you place the approximate center of the large wash that you have described, by a dashed line on exhibit G-3.



BY THE WITNESS: I didn't do that.

BY THE HEARING EXAMINER: I know, but if you could do that.

BY THE WITNESS: That is pretty much -- can I use blue? I'm not very sure I can do this too well, because this is not a stereographic -- and it is not quite -- it's not really positive here. I'll do it in black, which I have available. It would be, I suppose -- I'm dashing it in black. It's not very obvious here, but the line itself -- the dashed line itself, is along what shows us the rill, the center of the channel you might say, were there is evidence of water forming channels, and down through here, it widens out down in here for a short distance. I am referring to exhibit G-3, black marks I am putting on it. The edge I will put a solid line just north of the western portion of the Charleston 24/39, a part known as no. 11. There is an old -- what Mr. Sullivan refers



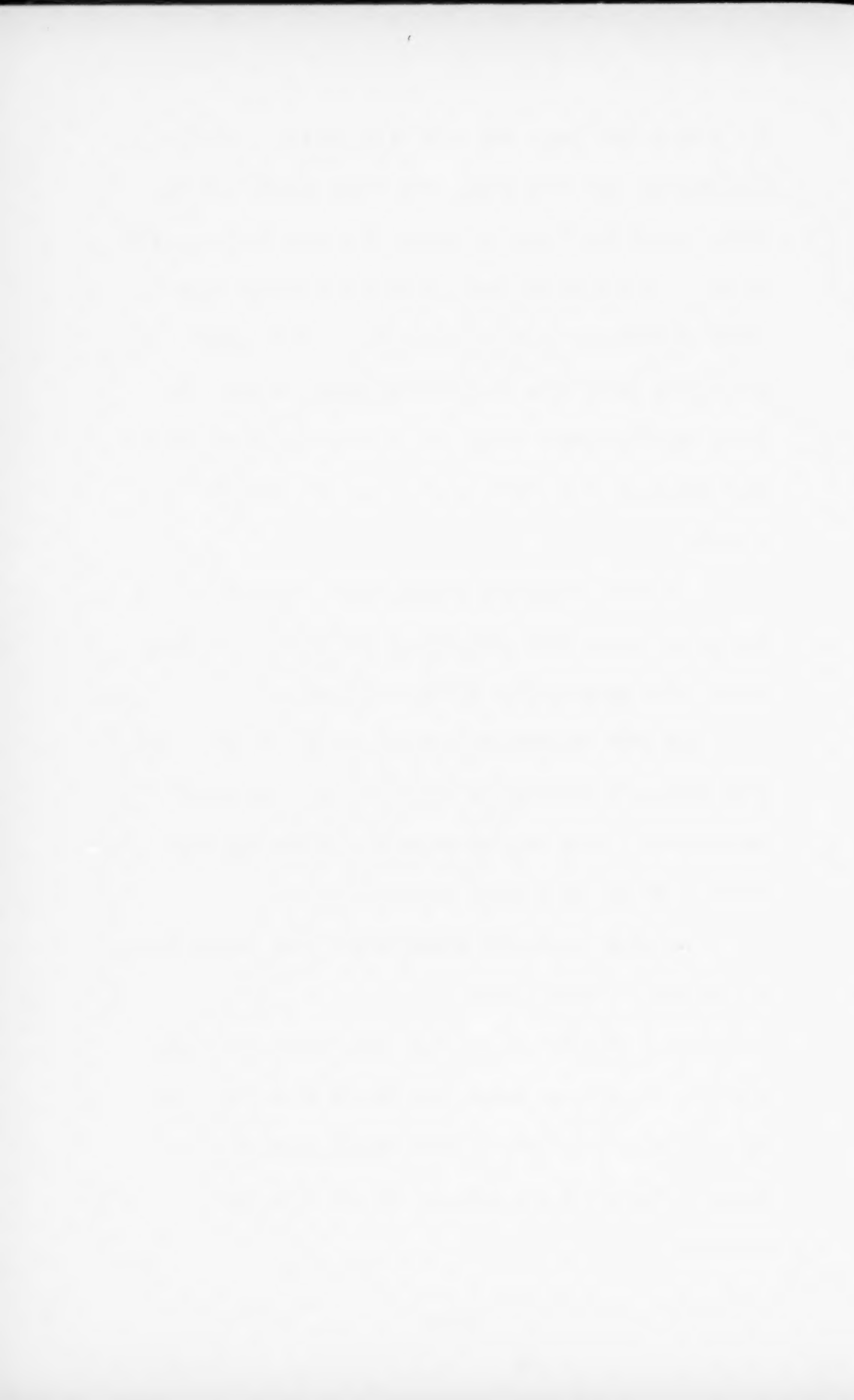
to and I do too, as the old road. It is passable, by the way, in this area. And that road is fairly close to the hill. The hill -- by referring to hill I mean the land rises to the south of this rather abruptly and the new road comes over the hill and passes down into the draw at the end beyond the west end line of 24/39 claim.

BY THE HEARING EXAMINER: The new road is more into the interior of these claims that are presently under contest?

BY THE WITNESS: That is correct. If you like, I can make this a little more definite. The black doesn't show up too well. When you look at it closely --.

BY THE HEARING EXAMINER: As long as it shows, that's all.

Q (By Mr. Aho) If you were to rely solely on going down the draw and picking up the loose gravel, how much quantity would there be to scoop up on the two claims?



A Well, very little. I couldn't make any estimate to actual quantity, but it's a very minor part of the area encompassed by either claim.

Q Do you agree with Mr. Sullivan's statement that the gravel bed may extend over a hundred feet in this area?

A I don't know why not.

Q In your opinion, are there sufficient excavations on the two claims to enable anyone at the present time to determine the depth of the deposit on the two claims?

A Not on the claims, no. Not that I have seen on the claims.

Q Do you have any rough estimate of the total amount of gravel on the two claims?

A It would be an essential depth -- I'll have to separate this answer, because on the Charleston Spur no. 1 there is not much. Less than, or approximately, three



acres of actual sand-gravel type deposit. Its depth, I do not know. On the Charleston 24/39, one could say, for all practical purposes, within a reasonable length of time, unlimited.

Q A million cubic yards?

A Easily?

Q Claim 14, as shown on exhibit G-2, has an excavation on the westward boundary, does it not?

A It does.

Q Is that also shown on exhibit G-3?

A It does.

Q And where is it shown on exhibit G-3, the excavation on claim 14?

A It is in the approximate center of Section 35, south of the center line of the Section. It would be immediately north of claim 24/39. I don't quite know how to describe this for this illustrated purpose, but its opening is directly off the road in the canyon.

Q Did you see the excavation there when you made your examination this year?

A I did.

Q It is still visible?

A Oh, yes.

Q It was visible when the aerial photo, exhibit G-3, was made in 1965.

A That is correct.

BY MR. AHO: That's all.

BY THE HEARING EXAMINER: Mr. Schessler, did you make any investigation or review of the title documents respecting the conflict in ownership of claims between Mr. Sullivan and the Charleston Company?

BY THE WITNESS: I did not. This was done by the examiner who did the work from which the contest was initiated.

BY THE HEARING EXAMINER: In the contest which was versus Charleston Stone, do you know if Mr. Sullivan was named in that case?

BY THE WITNESS: Offhand, I do not.



BY MR. AHO: No, he was not.

BY THE HEARING EXAMINER: And Charleston Stone, the records show here, was not named in this proceeding.

BY MR. AHO: Correct.

BY THE HEARING EXAMINER: So, the most that we can say for the time being is that there apparently is an overlap.

BY MR. AHO: There is an overlap and the Bureau is contesting the title of both claimants to the land involved in these two series of claims.

BY THE WITNESS: May I add that I merely acted on the assumption. I knew that these had been contested in the Charleston Stone Products case, but I also knew by description that they are supposedly a part of the Charleston 24/39 claim. I merely acted on that premise.

BY THE HEARING EXAMINER: Do you have any questions, Mr. McNutt?



BY MR. McNUTT: I have a couple of questions I would like to add.

BY THE HEARING EXAMINER: Mr. Schessler, will you take your seat at this point?

BY THE WITNESS: Yes, sir.

RE-CROSS EXAMINATION BY MR. McNUTT:

Q I have to go back and refer to exhibit G-3, again, while I take a good look at this time. You said that the road, and I don't recall if it is the old road or new road. Anyway, the road that goes over the hill, goes right past the Section corner between 34 and 35, 3 and 2?

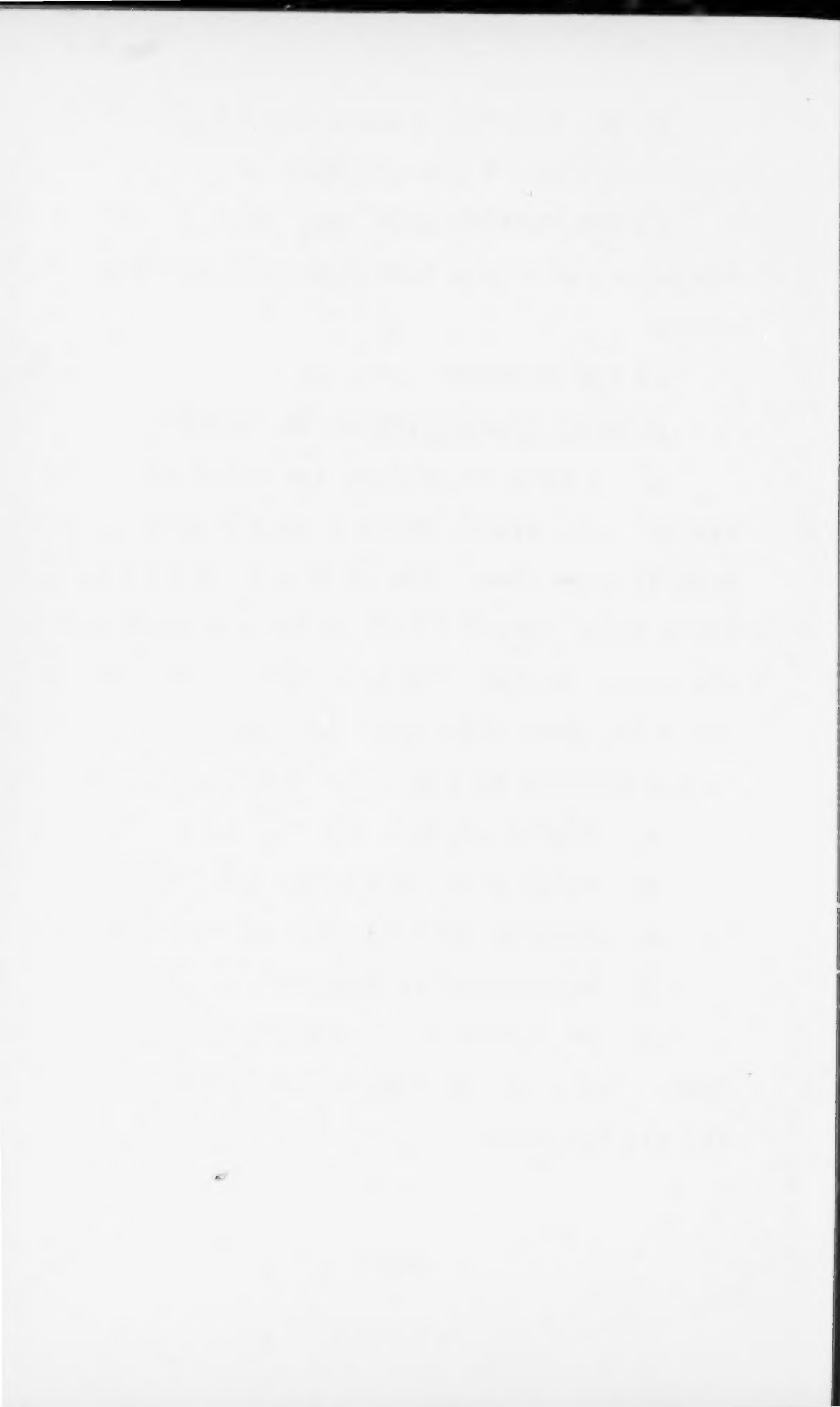
A That's right.

Q Which side does it go on?

A Section corner, east of the road.

Q Approximately how far?

A Oh, guessing, probably 20 or 30 feet. Maybe not that much. It's not very far off the road.



Q Is it possible that this large excavation in claim 10 could also extend across the Section line between 34 and 35 into claim 11?

A I don't think so, no, sir.

Q The wash that we have been talking about is pretty flat, isn't it?

A It is flat on its bottom. Yes, it is.

Q Any flooding would be equal, primarily?

A I'll have to agree with you, yes. But I THINK a lot of this stuff acts as a -- you get a slush. I think when these things get with a little bit of water, a little of it -- a lot of it, the whole mass tends to act as a dump and you will have some of these materials spilled over the surface, so they affect -- I think this one of the reasons for these flat washes, lots of times. It's like a -- the beds that they use for these various ores,



for instance, separating ores, suspension in air, whereas here, it's a suspension in water. There's a term for it, I can't just recall it right now. But I'd agree with you, yes. That's just my theory on some of these washes out there.

BY MR. McNUTT: I think that's about all.

BY MR. AHO: I have nothing further.

BY THE HEARING EXAMINER: You may be excused, Mr. Schessler. Both sides, having presented their oral testimony in this matter, I will briefly describe the regular briefing procedure in a case of this type. If the briefs are submitted, the government usually submits the first brief after a time has elapsed when the transcript is delivered. Then the contestee has the right to respond to the government's brief and, if permission is granted, the government can file a reply brief if there is any new material brought

up in the responding brief. Mr. Aho, did you wish to say anything?

BY MR. AHO: Yes. I will submit a short opening brief 45 days after receipt of transcript.

BY THE HEARING EXAMINER: It is so ordered. The government may have the privilege of submitting an opening brief within 45 days after receipt of a copy of the transcript from the Office of hearings & Appeals. Did Mr. Sullivan wish to submit a responding brief?

BY MR. McNUTT: I am sure we will.

BY THE HEARING EXAMINER: Following receipt of a copy of the government's brief -- service of that -- Mr. Sullivan will have the right to file with the Office of Hearings & Appeals and serve, of course, on Mr. Aho, a brief in response to the government's brief. Would 30 days be enough for that?

BY MR. McNUTT: I think so.



BY THE HEARING EXAMINER: That brief should be submitted within 30 days after receipt of the government's brief. Is there anything further to be taken up at this time?

BY MR. AHO: No, except I hope the record is clear as to -- I serve my brief, I guess on Mr. Sullivan, with a copy to you, but is his address on record so I will know where to send it?

BY THE HEARING EXAMINER: Well, we have had some difficulty with Mr. Sullivan's address, but he assures me, notwithstanding the fact we have been getting letters back from the box, that his address is Post Office Box 3186, North Las Vegas. The portion of this case devoted to taking of oral testimony is closed.



"This is to certify that the attached proceedings before the UNITED STATES DEPARTMENT OF THE INTERIOR, BUREAU OF LAND MANAGEMENT in the matter of:

UNITES STATES OF AMERICA, Contestant,
vs.

Frank R. Sullivan, Contestee
Claim Nos. N-065732 and N-065733
FEBRUARY 18, 1971 taken at
United States Federal Building
300 Las Vegas Boulevard, South
Las Vegas, Nevada, 9:30 O'clock A.M.
Room 4-612

were held as herein appears, and that this is the original transcript thereof for the file of the Department.

Henrietta Vaughn
Official Reporter